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CASE NO.

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IN THE SUPREME COURT OF THE UNITED STATES

BEVERLY ENTERPRISES, INC. and DONALD L. DOTSON,
Petitioners,

v.

ROSEMARY TRUMP and SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585
Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTIONS PRESENTED

I. Does the First Amendment require courts to analyze the intended or received meaning of an alleged defamatory statement and whether the statement contains a factual connotation capable of being proven true or false before concluding that a statement is nonactionable as rhetorical hyperbole?

II. May a court of appeals grant more protection in public figure libel cases than required by the First Amendment where, in doing so, it is in conflict with decisions of a state court of last resort?

III. May the standards established by this Court in *Linn v. Plant Guard Workers* to effectuate a uniform national labor policy for defamation during a labor dispute be overridden by states imposing a pecuniary or other special damage requirement in addition to actual malice and actual injury to reputation?

PARTIES TO THE PROCEEDING

Appellants in the court below and Petitioners herein are Beverly Enterprises, Inc. ("Beverly") and Donald L. Dotson, Beverly's Senior Vice President of Labor & Employment. Beverly has no parent corporation nor does it have any non-wholly owned subsidiaries.

Appellees in the court below and Respondents herein are Service Employees International Union (the "SEIU") Local 585, a labor organization, and its President, Rosemary Trump.

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Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Petitioners Beverly Enterprises, Inc. and Donald L. Dotson ("Petitioners") respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals, dated July 8, 1999, is officially reported at 182 F.3d 183 and is reproduced in the Appendix ("A") at A2. The Third Circuit's Order dated July 30, 1999, denying Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced at A22. The decision of the U.S. District Court for the Western District of

Pennsylvania, dated March 5, 1998, is officially reported at 1 F. Supp.2d 489, and is reproduced at A13.

JURISDICTION

The Judgment and Opinion of the Third Circuit Court of Appeals was entered and filed on June 28, 1999 and modified, for punctuation only, on July 8, 1999. On July 12, 1999, Petitioners timely filed a Petition for Rehearing and Suggestion of Rehearing En Banc, which was denied by Order filed July 30, 1999. This Petition for Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is vested under 28 U.S.C.S. Section 1254(1) (Law. Co-op. 1988 & Supp. 1999).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED [Included in Appendix]

First Amendment to the U.S. Constitution

29 U.S.C. §151

29 U.S.C. §158(c)

18 U.S.C. §§207, 208 and 216

STATEMENT OF THE CASE

Introduction. This diversity-based defamation action arises from statements made by Respondent Rosemary Trump about Petitioner Donald Dotson during two separate incidents, one at a political rally and another at a televised "Town Hall meeting." The statements were made during the course of what the Third Circuit Court of Appeals described as "a long standing and acrimonious

relationship between Beverly Enterprises, a national provider of nursing home care, and the Service Employees International Union ("SEIU"), whose local affiliates represent a substantial number of Beverly's employees." (A3-4) .

Petitioner Donald L. Dotson is Beverly's Senior Vice President for Labor and Employment since 1992 and prior to that, the Court of Appeals acknowledged, "had a prestigious career in labor relations, serving as Chairman of the National Labor Relations Board and as Assistant Secretary for Labor-Management Relations at the U.S. Department of Labor." (A4). Respondent Rosemary Trump was President of Local 585 of the SEIU.

There are three defamatory statements at issue. Petitioners contend each was incorrectly decided by the Court of Appeals to be not actionable. One is the statement that Dotson had "devot[ed] [his] entire career to busting unions." A second statement accused him of being "part of that World War II generation that danced on the graves of Jews." A third accused him of seeking employment with Beverly to represent the company on matters on which he had acted in his official capacity as Chairman of the National Labor Relations Board and on which he had obtained or had access to confidential information during his tenure as a public official.

As Dotson is a public figure and the defamation occurred during a labor dispute, Dotson alleged that Trump acted with actual malice in making these statements and that his reputation had been injured. Dotson did not allege that he had suffered any special, out-of-pocket damages. Petitioner Beverly sued Trump only on the third statement at issue and both sued Trump in her individual capacity only. A second suit was filed against SEIU Local 585 over the third statement after Local 585 declined to repudiate Trump's comments or indicate that the statements had not been made in her official

capacity as President of the Local 585. It was consolidated with the case against Trump. (A21). A discussion of the three defamatory statements follows.

"Dotson Devot[ed] [His] Entire Career To Busting Unions." Trump confronted Dotson in August, 1996 at a political rally in Pittsburgh for the Dole/Kemp presidential campaign. She approached Dotson in the middle of a large crowd and, when Dotson admitted he did not know who she was, became visibly upset, told Dotson he should know who she was. She then identified herself and began to berate Dotson in a loud and angry voice, including accusing him of "devoting [his] entire career to busting unions." (A4).

Relying on *Old Dominion Branch No. 496 National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 268 (1974), the District Court held the statement to be incapable of a defamatory meaning, finding it to be "mere hyperbole and insulting rhetoric that are unfortunately commonplace in labor disputes." (A15-16). The Court of Appeals affirmed, citing *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 14 (1970). Neither the District Court nor the Court of Appeals analyzed the meaning of the statement and whether it was capable of being proven true or false.

"You're Just Part Of That World War II Generation That Danced On The Graves Of Jews." After the preceding statement, the Court of Appeals noted that "despite Dotson's efforts at reasoned discourse, Trump continued berating Dotson, finally shouting at him: 'I know your kind. You're just part of that World War II generation that danced on the graves of Jews.'" (A4).

The District Court held that the statement was also rhetorical hyperbole which no person would have taken literally and hence was incapable of defamatory meaning. (A16). The Court of Appeals did

not agree and held that the statement was capable of a defamatory meaning. (A7). Nevertheless, the Court of Appeals affirmed the lower court's dismissal, finding that the statement was not *per se* defamatory. As Dotson had not pled special, pecuniary damages, it upheld the dismissal on those separate grounds, i.e., *per quod* slander in Pennsylvania requires the pleading of pecuniary or other special damages in addition to pleading actual harm to reputation.

In holding the statement was not defamatory *per se*, the Court of Appeals failed to address the question of whether taking public delight in the slaughter of Jews during the Holocaust and enthusiastically endorsing mass murder, imputed to Dotson characteristics or views incompatible with his position as a lawyer or as a former high public official, something which is uniformly considered defamation *per se*. *See* Restatement (Second) of Torts, §569, comment e; §573, comments b, c and e (1977).

"Don Dotson Knocked On . . . The Beverly Door And Said, Who Knows More About All Of Your Unfair Labor Practice Cases Than Me, Since I Have Been Supervising Them on Behalf of the Government?" In May, 1997, the SEIU and Trump organized a "Town Hall meeting," persuading several Democratic members of Congress to gather that day purportedly to hear unsworn statements concerning a pending bill. Petitioners' Complaint alleged that the true purpose of the "Town Hall meeting" was to provide an attention-getting forum to attack Beverly and assist the SEIU in its corporate campaign against Beverly during a time of collective bargaining negotiations between Beverly and the SEIU in Pennsylvania. (A48).

The meeting was broadcast on local cable television (A51). Trump was asked a question by one of the Congressmen: "Just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at the other Beverly

locations across the country? What transpired in Pennsylvania to make the situation here much worse?"

During her answer, Trump made the following statement: "But quite frankly when President Clinton was elected and a new Chairman of the National Labor Relations [Board] was appointed, the former Chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government . . . ." (A37-38).

The District Court refused to rule on whether this statement was defamatory, holding that Trump had absolute testimonial immunity. The Court of Appeals declined to consider the District Court's finding of absolute testimonial immunity. Instead, though not briefed by the parties on appeal, the Court held that the statement was not defamatory *per se* because it did not accuse Dotson or Beverly of engaging in criminal conduct. As neither Dotson nor Beverly had claimed special damages, the Court of Appeals dismissed the case on the same basis as the defamatory statement about Dotson "dancing on the graves of Jews," i.e., slander *per quod* in Pennsylvania required pecuniary or other special damages *in addition to* actual damage to reputation.

As with the comment about dancing on the graves of Jews, the Court of Appeals did not consider whether an accusation that a lawyer sought private employment in representing a client on matters in which he had acted in a quasi-judicial capacity or in which he had substantial responsibility as a public employee reflected so adversely on his trade or occupation so as to constitute *per se* defamation. Likewise, the Court did not analyze whether a lawyer seeking private employment based upon his knowledge of confidential information

which he acquired or might have acquired while a government employee reflected adversely on his trade or occupation so as to constitute *per se* defamation. Such false statements which adversely reflect on an attorney's practice or a public official's position constitute defamation *per se*. *See* Restatement (Second) of Torts, §569, comment e; §573, comments b, c and e (1977).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

I. THE THIRD CIRCUIT'S FINDING OF RHETORICAL HYPERBOLE WITHOUT CONDUCTING AN ANALYSIS OF WHETHER THE STATEMENT CONTAINED A FACTUAL CONNOTATION CAPABLE OF BEING PROVEN TRUE OR FALSE WAS IMPROPER AND CONTRARY TO SUPREME COURT CONSTITUTIONAL DEFAMATION DOCTRINE

This case raises the question of whether there is a short cut for finding rhetorical hyperbole to be constitutionally privileged, i.e., incapable of a defamatory meaning. Are dismissive conclusions, accompanied by a label, or based on a category, constitutionally sufficient? The Third Circuit thinks so and, unfortunately, so do many other circuits, in clear violation of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) and its predecessors.

A. The Statement that a Former National Labor Relations Board Chairman and Assistant U.S. Secretary of Labor "Had Devoted His Entire Career to Union Busting" Contains a Factual Connotation Capable of Being Proven True or False

Petitioners contend that *Milkovich* and the decisions of this Court preceding it regarding the constitutional protection afforded rhetorical hyperbole, *Greenbelt*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) and *Austin* make clear that courts cannot afford constitutional protection to potentially defamatory statements simply by applying a label of rhetorical hyperbole and failing to analyze the intended or received meaning of the words and whether they contain a factual connotation capable of being proven true or false.

Under this Court's precedents, particular words or categories of words should not automatically be afforded constitutional protection as rhetorical hyperbole when the words have both a literal and a figurative meaning *and* the meaning intended or received is literal.

Judge Posner correctly explained this principle in his decision in *Dilworth v. Dudley*, 75 F.3d 307 (7th Cir. 1996):

> Among the terms or epithets that have been held . . . to be incapable of defaming because they are mere hyperbole rather than falsifiable assertions of discreditable fact are "scab," "traitor," "amoral," "scam," "fake," "phony," "a snake-oil job," "he's dealing with half a deck," and "lazy, stupid, crap-shooting, chicken-stealing idiot." It is apparent from the list that the defamatory capability of these terms cannot be determined without consideration

> of context. *See Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 1542, 26 L.Ed.2d 6 (1970) ("blackmail"); *McCabe v. Rattiner*, 814 F.2d 839 (1st Cir. 1987) ("scam"). Each of the terms has both a literal and a figurative meaning and whether it is capable of being defamatory depends on which meaning is intended, a question that can be answered only by considering the context in which the term appears. "Scab," for example, means literally one who is hired to replace a striking worker, but it is also used figuratively, to denote a worker who is not a union supporter. If as in *National Association of Letter Carriers v. Austin, supra*, a person is called a "scab" in a union newsletter because he refuses to join a union, this is not defamation but merely an expression of hostility; the word is obviously being used in its figurative sense. But if a union leader were accused of having been a scab in his youth, this could well be understood to be a literal use of the word and therefore an assertion that he had engaged in conduct that demonstrated his unfitness to be a union leader. And so with "traitor," another word held non-defamatory in *National Association of Letter Carriers v. Austin*. The use of the word in the context of that case was plainly figurative rather than literal, but the word was being used in its literal sense when Whittaker Chambers called Alger Hiss a traitor. Another example would be calling a person a "lunatic."

Dilworth, 75 F.3d at 310.

Judge Posner correctly interpreted and harmonized all of this Court's teachings on rhetorical hyperbole from *Greenbelt* through *Austin* to *Milkovich* in a way that the Third Circuit did not appreciate nor apply in the instant case. While there was a labor dispute between the respective employers of Dotson and Trump, this was not a picket line epithet hurled at Dotson by a striking worker. It was a large public gathering, a presidential campaign rally without any connection to the Beverly-SEIU dispute. Moreover, the words Trump used in front of this large crowd were quite specific and contained a literal meaning which is capable of being proven true or false, i.e., that Dotson had "devoted [his] entire career to busting unions." "[E]ntire career" obviously included Dotson's tenure at the National Labor Relations Board and at the U.S. Department of Labor where he was sworn to uphold the statutory rights of all appearing before the agency, including labor unions. Unlike "blackmail" in *Greenbelt* or "scab" or "traitor" in *Austin*, there is a literal meaning included within the Trump statement which, under *Milkovich*, contains a factual connotation capable of being proven true or false.[1]

What Trump said about Dotson is no different and no less defamatory than accusing the Chairman of the Equal Employment Opportunity Commission of having devoted his career to discriminating against persons on the basis of race or accusing the Chairman of the National Conference of Christians and Jews of having spent his entire life engaging in anti-Semitic conduct. The list could go on, but the factual connotation in each of these situations is clear: There is specific conduct being ascribed to a person which is completely inconsistent and incompatible with the duties of the position he held. A *Milkovich* analysis would have made this obvious.

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[1]The *Random House Unabridged Dictionary* 2072-2073 (2d ed. 1993) definition of "union buster" includes: " 2. Any person . . . that tries to destroy or weaken a union, as through prosecution or intimidation."

There is absolutely no recognition in the Third Circuit's opinion that this type of analysis is constitutionally required — what the meaning was; whether the meaning intended was figurative or literal; and, if literal, whether it contained a factual connotation capable of being proven true or false. Both the District Court and the Court of Appeals saw the term "busting unions" and did no more. Both courts automatically assumed the meaning intended was figurative, while ignoring the key phrase which made it literal, i.e., "devoted [his] entire career." This is precisely the point Judge Posner made in *Dilworth*:

> If you say simply that a person is a "rat," you are not saying something definite enough to allow a jury to determine whether what you were saying is true or false. If you say he is a rat because. . . whether you are defaming him depends upon what you say in the because clause.

Dilworth, 75 F.3d at 309.

Had it stood alone — like "scab," "traitor," "blackmail" or "scam" — "busting unions" may have been sufficiently indefinite to sanction the views of the court below. But Trump also added what Posner calls a "because" clause, saying Dotson has "devoted [his] entire career" to union busting, i.e., he is not just a union buster today because he works for Beverly but he has always been one even when he held high public offices where he was legally obligated to protect the rights of labor unions.

Unfortunately, the Third Circuit's truncated approach in this case is not an aberration among the circuits. Other circuits also use categories or labels as a substitute for the required analysis of

meaning and whether the meaning intended or received is figurative or literal.

B. The Circuits' Inconsistent Application of *Milkovich* and *Masson* Has Failed to Give Effect to This Court's Mandate to Emphasize Meaning Over Categories and Labels in Defamation Analysis

This Court's decisions in *Milkovich* and *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991) build upon the Court's earlier decisions in *Greenbelt*, *Austin* and *Falwell*, and emphasize the role of meaning in defamation analysis, in contrast to previous decisions of this Court which had emphasized labels and categorization over meaning.[2] The circuits' response to *Milkovich* and *Masson* has been confusing, inconsistent and inappropriate. If not clarified quickly, the circuits will continue to thumb their noses at those decisions, sabotaging their mandate of a meaning-based analysis of defamation.

Milkovich denounces the "categories" approach to defamation law. It rejects any approach to defamation analysis which focuses on genre or labels. *Milkovich* instead protects unprovable statements, i.e., statements that do not contain a factual connotation capable of being proven true or false. The dispositive question in *Milkovich* was what was the author's point — did he mean to say that Milkovich committed perjury? *Masson* held that altered quotes were actionable only if they resulted in a material change in the *meaning* conveyed by the statement. Thus, in both cases, this Court adopted

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[2]For instance, the actual malice rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964) protects speech regardless of meaning. *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), which emphasize fault, the status of the plaintiff and whether the statements at issue are of public or private concern, without regard to meaning.

a test that was explicitly based on the meaning of the statement at issue.

The *Milkovich* and *Masson* tests are consistent with the pragmatic paradigm of meaning. In *A Pragmatic Approach to Meaning in Defamation Law*, 34 Wake Forest L.R. 333 (1999), Prof. Jeffrey Thomas argues that this focus on meaning in defamation law is just as it should be. Prof. Thomas points out that the tests set forth in *Milkovich* and *Masson* emphasize the gist of the statements, not their precise literal meanings, and that analysis of gist requires consideration of both the point which the author intended to convey as well as what the recipient understood the author's point to be. 34 Wake Forest L.R. at 397. Only then can a court determine whether the statement at issue contains a factual connotation capable of being proven true or false.

The Third Circuit in this case is only one example of the federal circuit courts' continued fascination with genre and label, and failure to properly analyze a statement's meaning. Judge Posner, in *Dilworth*, *supra*, is the exception, rather than the rule.

Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122 (1st Cir. 1997) is in marked contrast to *Dilworth*. At issue were two statements: First, that the plaintiff's store was "trashy" and, second, that when you call plaintiff's store, "you are sometimes put on hold for 20 minutes — or the phone is never picked up at all." The First Circuit took two different analytical approaches to determine whether these statements were capable of a defamatory meaning.

With regard to the "trashy" statement, the court of appeals concluded that the term did not imply provably false facts. Observing that the word evoked a multiplicity of meanings, the First Circuit concluded that the more meanings a term can reasonably convey, the

less likely it can be actionable. The intended or received meaning of the term in the context of the case played no role in the court's analysis.

The court's conclusion with regard to the "on hold for 20 minutes" statement was that it was sufficiently factual to be proven true or false because it could be regarded as stating actual facts about the store. *Levinsky's, Inc.*, at 131. Although the court did not attempt to determine the point intended to be conveyed by the speaker, it did, at least superficially, examine what the recipient of the statement would have understood the point to be and concluded that the overall context did not dispel the impression that actual facts were being stated.

The approach of the Eighth Circuit in *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union Local 655*, 39 F.3d 191 (8th Cir. 1994) is typical of the flawed approach of many courts since *Milkovich*. Although the court cites *Milkovich*, as well as *Austin* and *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966) for the proposition that statements are actionable only if they reasonably imply false and defamatory facts, there is no initial analysis of the meaning of the statements at issue. Instead, as did the Third Circuit in this case, the Eighth Circuit analyzed context only so that it could label the statement at issue as one which occurred during an ongoing labor dispute. There was no subsequent analysis of how the labor dispute context may have affected the recipient's understanding of the author's point.[3]

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[3]Context should be used to discern meaning and not, as in many of these cases, to categorize or label terms. "Most courts simply read the statement and determine whether the context will support the meaning at issue. The approach of the pragmatic paradigm, however, focuses the inquiry on the recipient's interpretation of the *speaker's* meaning." Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 Wake Forest L.R. at 356 (footnotes omitted).

In *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997), the Ninth Circuit has come the closest to Judge Posner in properly analyzing meaning under *Milkovich*. The court did not cite *Milkovich* in analyzing the defamatory meaning of a picket sign which said, "This medical facility is full of rats," but the court properly examined both the statement's intended and received meaning and held that it was capable of being construed literally as the hospital having a rodent problem even though the union claimed that the term "rat" had deep historical meaning in the context of labor disputes to figuratively mean an employer who fails to pay prevailing wages.

In another Ninth Circuit case, however, *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999), the court cited *Milkovich*, but gave only lip service to an analysis of meaning and really used *Milkovich* (improperly) to justify a categorical approach to defamation. In that case, the allegedly defamatory statement was calling the head of the local firefighters' union a "Jimmy Hoffa." The court applied a 3-part test which analyzed context but not what meaning the author intended, or what the recipients of the message may have understood, i.e., that plaintiff was being compared to a convicted felon who had close ties with and was eventually killed by organized crime elements. Thus, context was used to arrive at the label of rhetorical hyperbole without an analysis of meaning. *See also Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995), where the same test was also applied to determine that the statement, "If I defend you the way [plaintiff] is defending Walker, you'll spend the rest of your life in prison," was non-actionable rhetorical hyperbole and imaginative expression.

The D.C. Circuit has also grappled unsuccessfully with the concept of defamatory meaning under *Milkovich*. In *Moldea v. New York Times Co.* (*Moldea II*), 22 F.3d 310 (D.C. Cir.), *cert. denied*,

513 U.S. 875 (1994) the panel reversed its own decision from three months earlier (15 F.3d 1137) that a book reviewer's criticism that plaintiff's book was marred by "too much sloppy journalism" was actionable because it was verifiable. In *Moldea II*, Judge Edwards concluded that the panel's earlier decision had failed to take sufficient account of context, i.e., that the statements at issue appeared in a book review, "a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations." *Moldea II*, 22 F.3d at 311. *Moldea II* noted that context was especially important in hyperbole cases, "because it is in part the *settings* of the speech in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them." *Moldea II*, 22 F.3d at 314.

This sounds like the Court properly used context to analyze the recipient's understanding of the author's point. The court's analysis of context, however, was used not to determine meaning, but to categorize book reviews as a distinct genre and apply a different set of rules to that genre. For book reviews and other journals of commentary or criticism, *Moldea II* adopts the "supportable interpretation" test, i.e., whether the critic's interpretation is supported by the actual text. Although the Supreme Court's decision in *Masson* is cited as supporting this test, it is a test with no real reference to meaning.[4]

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[4]Other examples of circuit court decisions which purportedly apply *Milkovich* without first analyzing the meaning of the words at issue include *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 186 (4th Cir. 1998) (critical statements in a "stock-tip" column held non-actionable "based on the tenor, language and context of the article, . . . "); and *Hayhurst v. Beyrle*, No. 95-3335, 1996 U.S. App. LEXIS 15404 (10th Cir. June 25, 1996) (letter from the defendant doctor indicating that he could not support a colleague who uses certain therapies, because the colleague is not a good representative of the profession, is non-actionable).

The circuit courts have had almost ten years to figure out *Milkovich*, and they still consistently get it wrong. Much defamation analysis looks no different than it did prior to *Milkovich*, with labels and categories determining outcome, rather than meaning and factual verifiability. It is clear that the circuit courts will not find their way on their own, but must be led further by this Court.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THE PENNSYLVANIA SUPREME COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING THE PROTECTIONS AVAILABLE TO DEFENDANTS UNDER THE FIRST AMENDMENT IN PUBLIC FIGURE DEFAMATION ACTIONS

This case calls into question the propriety of a federal appellate court decision providing more protection to defendants in public figure libel cases than does the First Amendment, and doing so in direct conflict with the Pennsylvania Supreme Court.

A. The Third Circuit's Decision Imposes an Additional Burden on Public Figure Libel Plaintiffs in Pennsylvania to Prove Pecuniary or Other Special Damages in Addition to Actual Harm and Actual Malice

Under this Court's Decisions, Public Figures Need Only Plead Actual Malice and Actual Harm to Reputation to State a Claim for Relief

Beginning with *New York Times, Co. v. Sullivan*, this Court has carefully struck the balance between the First Amendment guarantees of free speech and free press, and the rights of individual citizens to protect their good names and standing in the community. Major aspects of the common law of defamation have now been

constitutionalized, including what proof is required for the recovery of presumed and actual damages to reputation.

This Court first addressed the constitutional implications of defamation damages in *Gertz v. Robert Welch, Inc.* *Gertz* held that defamation could no longer be a strict liability tort and that the recovery of presumed damages without a showing of fault, even in cases of defamation *per se*, improperly infringed upon First Amendment freedoms. Thus, the Court in *Gertz*, consistent with its previous holding in *Linn*, held that there can be no liability for defamation without a showing of some level of fault by the publisher. *Gertz*, however, held that the First Amendment *does permit* recovery of presumed damages in cases where the *New York Times* standard of actual malice has been proven.

This is a public figure defamation case. Petitioner Dotson acknowledges that he is a public figure and must prove actual malice to prevail in this action. Petitioners' Complaint clearly meets the standards of *Linn* and *Gertz* by alleging that the three defamatory statements at issue were published by Trump with actual malice, and have resulted in actual harm to Petitioners' reputations and standing in the community.

The Third Circuit's Decision Improperly Expands the Protections Available to Defendants in Public Figure Defamation Cases in Pennsylvania

The Third Circuit Court of Appeals affirmed the dismissal of Petitioners' claims based upon Trump's "dancing of the graves of Jews" and "Town Hall" meeting statements because it concluded that those statements were not defamatory *per se*, and Petitioner had failed to allege special damages. Thus, despite the fact that *Gertz* explicitly held that presumed damages were recoverable when actual

malice was proven, and despite the fact that Petitioners went beyond mere reliance on presumed damages and alleged actual damages to their reputations, the Third Circuit added the extra hurdle of pleading and proving special damages. In doing so, the court of appeals relied upon a number of Pennsylvania cases, all decided before *Gertz*, which held that plaintiffs in slander cases which are not *per se* must allege special damages, including *Baird v. Dun & Bradstreet, Inc.*, 285 A.2d 166 (Pa. 1971); *Solosko v. Paxton,* 119 A.2d 230 (Pa. 1956); and *Altoona Clay Prod. Inc. v. Dun & Bradstreet, Inc.*, 246 F. Supp. 419 (W.D. Pa. 1965), *rev'd on other grounds*, 367 F.2d 625 (3d Cir. 1966).

Since, in the court's opinion, the "dancing on the graves of Jews" and the "Town Hall" meeting statements did not constitute an accusation of criminal wrongdoing, they were not slander *per se*, and Petitioners' claims based upon these statements were dismissed for failure to allege special damages. (A12).[5] By adding the special damages hurdle in *per quod* cases, the Third Circuit has clearly expanded the protections afforded defendants under the First Amendment by this Court in public figure defamation cases. Such expansion is directly contrary to Pennsylvania law as set forth by the state's highest court.

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[5]The Third Circuit did not even consider whether Trump's "Town Hall" meeting statements could reasonably have been interpreted as imputing unethical business misconduct which would also render them slanderous *per se*. This was inexcusable, especially in light of the appeals court's recognition that Trump's "statement undeniably implies that Dotson sought to capitalize on his knowledge of the NLRB's prosecutions of Beverly in an effort to obtain employment with Beverly," and that "Dotson successfully secured his job at Beverly on the basis of his knowledge of their ongoing litigation with the NLRB." (A11).

The Third Circuit's Decision Conflicts with a Decision of Pennsylvania's Highest Court Which Strictly Limits the Protections Available to Defendants in Public Figure Libel Cases to Those Provided by the First Amendment

The Pennsylvania Supreme Court has explicitly held that Pennsylvania's constitution will not allow any greater protection for speech than is mandated by this Court under the First Amendment. This is because Article I, section 1 of the Pennsylvania Constitution provides:

> Inherent Rights of Mankind
>
> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, *possessing and protecting property and* ***reputation***, and of pursuing their own happiness. (emphasis added.)

In *Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988), Pennsylvania's court of last resort held that Pennsylvania courts may go no further than this Court's dictates in protecting First Amendment principles, lest they violate Pennsylvania's unique constitutional protection of its citizens' reputations:

> It is clear that the Supreme Court has set forth the parameters necessary to satisfy the dictates of the First Amendment. Any further action on our part could run afoul of our state constitution. Under Article I, section 1 of the Constitution of this Commonwealth, a person's interest in his or her reputa-

> tion has been placed in the same category with life, liberty and property.

Sprague, 543 A.2d at 1084 (citations omitted).[6]

Thus, the Third Circuit's decision, which expands the protections afforded defendants under the First Amendment by the decisions of this Court, is in conflict with the Pennsylvania Supreme Court which has made clear that the Pennsylvania Constitution does not permit an expansion of protections beyond those provided by the First Amendment in public figure defamation cases.

B. The Third Circuit's Decision Conflicts with Decisions of Pennsylvania's Supreme Court Which Make Clear That Trump's Statements At The Publicly Televised "Town Hall" Meeting Are Libel, Not Slander, Thus Negating Any Requirement of Special Damages

Television broadcasts are libel, not slander. As alleged in Petitioners' Complaint, the "Town Hall" meeting where Trump made her statement about Dotson "knocking on the door of Beverly" was broadcast on cable television. (A51; *see also* Affidavit of Rosemary Trump, A55). Thus, there can be no dispute that Petitioners' claim regarding that statement is for libel, not slander.

According to the Restatement (Second) of Torts §568A (1977), "Broadcasting of defamatory matter by means of radio or television is libel, whether or not it is read from a manuscript."

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[6]Only the constitutions of Arkansas, Delaware, North Dakota and Pennsylvania specifically list reputation as an inalienable right on a level with life, liberty and property.

> The wide dissemination that results from broadcasting over radio and television, together with the prestige and potential effect upon the public mind of a standardized means of publication that many people tend automatically to accept as conveying truth, are such as to put the broadcaster upon the same footing as the publisher of a newspaper.

Id., at comment a.

The Pennsylvania Supreme Court has treated defamation actions arising from radio and television broadcasts as libel, not slander. *Purcell v. Westinghouse Broadcasting Co.*, 191 A.2d 662 (Pa.1963); *Schonek v. WJAC*, Inc., 258 A.2d 504 (Pa.1969); and *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa.1987). As noted by Professor Smolla in his treatise, this is clearly the more reasonable position:

> The wide dissemination that results from such a broadcast, and the power and impact of the electronic media in contemporary American life, makes this position the most logical in light of the policy underlying the libel/slander distinction, which is to treat as libel those communications more likely to be seriously harmful.

Rodney A. Smolla, *The Law of Defamation* §1.04[4], at 1-11 (1998).

The court of appeals analyzed Trump's "Town Hall" meeting statements under the rules it believed applied to slander in Pennsylvania, not libel. As a result, the court affirmed the district court's dismissal of Petitioners' claims based on those statements because, under its interpretation of Pennsylvania law, slander cases which are

not *per se* require the pleading and proof of pecuniary or other special damages, even in the presence of actual malice and actual harm to reputation. *Agriss v. Roadway Express, Inc.*, 483 A.2d 456 (Pa.1984) (one of the cases relied upon by the Third Circuit) makes clear, however, that, at least in libel cases, Pennsylvania has eliminated the distinctions between *per se* and *per quod* and, thus, eliminated the requirement of special damages in favor of the *Linn* and *Gertz* requirements of actual harm to reputation and actual fault by the publisher.

By ignoring the Pennsylvania Supreme Court decision that the state constitution prohibits protection for libel defendants beyond those provided by the First Amendment, and by failing to classify Trump's televised statements as libel, not slander, the Third Circuit is in direct conflict with Pennsylvania's court of last resort on an important federal question, i.e., the protections to be afforded defendants under the First Amendment in public figure libel cases. Hence, at a minimum, this Court should grant Petitioners' Writ of Certiorari, vacate the decision and remand to the Third Circuit for reconsideration in light of the Pennsylvania Supreme Court cases with which its decision is in conflict.

III. THE THIRD CIRCUIT'S RELIANCE ON STATE LAW PLEADING DISTINCTIONS OF DEFAMATION *PER SE* AND *PER QUOD* TO IMPOSE A PECUNIARY OR OTHER SPECIAL DAMAGE REQUIREMENT IN ADDITION TO ACTUAL MALICE AND ACTUAL INJURY TO REPUTATION WAS IMPROPER AND CONTRARY TO SUPREME COURT DOCTRINE ON LABOR DISPUTE DEFAMATION

This case calls into question the validity, in the context of labor dispute defamation, of what one commentator has called the "bizarre twists and turns over the last two centuries" of arcane state law distinctions between defamation *per se* and *per quod* and the requirement of special, pecuniary damages in the latter.[7]

A. The Standard Established by this Court to Effect a Uniform National Labor Policy for Defamation During Labor Disputes Has Been Improperly Altered by the Third Circuit's Ruling

To what extent may states vary the uniform national standard set by this Court in *Linn* covering defamatory statements published

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[7] Smolla, *The Law of Defamation* §7.1 "Overview of Special Harm," at 7-2). Prof. Smolla goes on to state:

> The common law special harm rules were illogical enough when they were originally created. When the many historical variations and complicated first amendment rules that now must be superimposed upon them are added in, the result is a quagmire of archaic, arbitrary, internally inconsistent rules. The chaos that now exists under this regime does neither plaintiffs nor defendants any long term good.

Id. §7.08 at 7-18. Chaos based on "archaic, arbitrary, internally inconsistent" state common law is an anathema to a uniform, national labor policy.

during the course of a labor dispute? Specifically, to what extent may the states impose additional burdens on plaintiffs defamed during a labor dispute beyond those set by this Court? Petitioners submit that, if there is indeed to be a uniform national standard, the only appropriate answer is "not at all." This Court has already balanced the competing federal and state interests in this type of case and set the standard — a standard ignored by the Third Circuit.

One of Congress' primary purposes in passing the National Labor Relations Act (the "NLRA") was to establish a uniform national labor policy. And, on scores of occasions, this Court has been called upon to determine the extent to which the federal interest in establishing and maintaining a uniform national labor policy outweighs state interests which either directly or indirectly impinge upon that national policy. Forty years ago, this Court set forth in detail the analysis that should be applied to determine the "extent to which the variegated laws of the several states are displaced by a single, uniform, national rule . . . " *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241 (1959).

In *Garmon*, this Court stated that state law must be overridden if it impermissibly infringed upon a uniform national labor policy regardless of whether the conflicting state law is one specifically directed toward labor relations or is one of "broad general application." *See Garmon*, 359 U.S. at 244. Moreover, it does not matter whether the potential conflict concerned substantive "rules of law, [or] of remedy . . . ."

In *Linn*, this Court set *both* the standard to be met on the substantive rule of law *and* the remedy available to a plaintiff who has been defamed during the course of a labor dispute. Specifically, a party who has been defamed during the course of a labor dispute must prove that the defamatory statements were published with

"actual malice" *and* that the defamatory statements caused actual damage. This Court, in establishing this uniform national standard for libels growing out of labor disputes, held that the "known lie" has no more place in a labor dispute than it does in the political arena. *Linn*, 383 U.S. at 67. Moreover, in determining the appropriateness of establishing a uniform national standard, the Court stated:

> After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.

Linn, 383 U.S. at 63.

There can be no doubt that Beverly and Dotson met the *Linn* standard in the instant case. Indeed, the Third Circuit acknowledged as much — the complaint alleges that false and defamatory statements were published with actual malice and that actual damages then resulted. (A4). While the Third Circuit held that some statements were protected as rhetorical hyperbole, it also held (unlike the District Court) that accusing Dotson of being "part of that World War II generation that danced on the graves of Jews" imputed criminal conduct and bigotry to Dotson and hence was capable of a defamatory meaning. (A7). Likewise, the Third Circuit found that the accusation that Dotson sought employment with Beverly to represent it on matters on which he had acted in his official capacity as Chairman of the National Labor Relations Board might be susceptible of a defamatory meaning. (A12).

The Third Circuit nevertheless held that Dotson could not maintain his defamation suit against Trump and the SEIU despite having met the *Linn* standard of pleading. In reaching its decision,

the Third Circuit held that, under Pennsylvania law, in addition to meeting the *Linn* requirements, a plaintiff defamed during the course of a labor dispute must also plead and prove an additional element — pecuniary or other special damages in addition to reputational harm — where the defamation was not slander *per se*. The Third Circuit's decision thus has the unmistakable effect of fragmenting the uniform standard for defamation arising out of a labor dispute. A union can be held liable for actual damages resulting from defamatory utterances during the course of a labor dispute in one state which only requires reputational harm, but would escape liability for uttering the identical statements with identical damage to reputation in another state such as Pennsylvania. Such a result is hardly one designed to persuade unions to adopt procedures calculated to prevent "the malicious utterance of defamatory statements in any form" as *Linn* recommended.

B. The Wide Disparity Among the States on the Requirement of Pecuniary or Other Special Damages for Slander *Per Quod* Imperils the Congressional Mandate of a Uniform National Labor Policy and Demonstrates the Absence of a Compelling State Interest in Doing So in Labor Dispute Defamation

In *Plumbers Union v. Borden*, 373 U.S. 690, 693-694 (1963), this Court stated that when there is a conflict between the federal interest in establishing and maintaining a national labor policy and a state interest, the courts must essentially weigh the competing interests. The state interest can prevail only if it is a compelling or "overriding"one and the effect on a national labor policy is a "peripheral" one. This Court has already decided in *Linn* that the federal interest in a uniform labor law overrides state interests in setting forth varying *substantive* standards for recovery of defama-

tion damages that arose out of a labor dispute. This Court also set forth the remedies available:

> [G]eneral injury to reputation, consequent mental suffering, alienation of associations, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law.

Linn, 383 U.S. at 65.

Hence, the question now before the Court is whether the states can prevent a plaintiff defamed with actual malice during a labor dispute, who suffered actual damages, from recovering those actual damages by making archaic distinctions between defamation *per se* and *per quod* and preventing recovery of actual damage, in the latter case, unless the plaintiff has also suffered pecuniary or other special damages. Such relics of the common law of defamation essentially allow the states to add requirements beyond those set by *Linn* and to impose different standards on defamation arising during a labor dispute.

Many states have recognized that the *per se/per quod* distinctions are without validity in the era of constitutional defamation law, and no longer use those distinctions as a means of allocating a plaintiff's burden of proof.[8] Other states have explicitly eliminated the distinctions in libel, but have either left the old rules

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[8] *See Gobin v. Globe Publishing Co.* ("Gobin III"), 649 P.2d 1239, 1242 (Kan. 1982); *United Insurance of America v. Murphy*, 961 S.W.2d 752 (Ark. 1998); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. 1993); *Shuler v. The McGraw Hill Company, Inc.*, 989 F. Supp. 1377 (D. N.M. 1977) *aff'd*, 145 F.3d 1346 (10th Cir. 1998), *and cert. denied*, — U.S. — ,119 S.Ct. 548, 142 L.Ed.2d 456 (1998) (applying New Mexico law); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978) (libel); *Pate v. Service Merchandise Company, Inc.*, 959 S.W.2d 569 (Tenn. App. 1996) (slander).

regarding slander and special damages intact or have not addressed the issue directly in the slander arena.[9] Yet a third group of states still utilizes the distinctions, but appear to have dropped the special damages requirement for *per quod* cases in favor of an actual damages requirement consistent with *Gertz*.[10] In a number of other states, "actual" damages and "special" damages are not clearly defined, or are used interchangeably, making it difficult to determine what the damages pleading and proof requirements in those states really are.[11]

Linn recognized the states' overriding interest in protecting their residents from malicious libel. To that end, it imposed actual malice and actual harm requirements even in *per se* defamation cases. Petitioners submit that the states which still enforce the *per se/per quod* distinctions have articulated no additional overriding interest which would justify individual exceptions to a uniform, national labor policy.

This Court should grant the Petition and hold that the states may not utilize outmoded *per se/per quod* analyses of defamation occurring during a labor dispute to impose additional burdens of

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[9]*See Spence v. Funk*, 396 A.2d 967, 971 (Del. 1978); *Mid-Florida Television Corp. v. Boyles*, 467 So.2d 282 (Fla. 1985); *Lakian v. Globe Newspaper Co.*, 504 N.E.2d 1046 (Mass. 1987); *Holland v. Kennedy*, 548 So.2d 982 (Miss. 1989); *Matherson v. Marchello*, 473 N.Y.S.2d 998 (N.Y. App. Div. 1984); *Hinkle v. Alexander*, 417 P.2d 586 (Ore. 1966); *Holtzschleiter v. Thomson Newspapers*, 506 S.E.2d 497 (S.C. 1998); *Lent v. Huntoon*, 470 A.2d 1162 (Vt. 1983); *Bauer v. Murphy*, 530 N.W.2d 1 (Wis. App.), *rev. denied*, 537 N.W.2d 570 (Wis. 1995); *Agriss v. Roadway Express, Inc.*, 48 A.2d 456 (Pa. Super. 1984).

[10]Those States include California (slander), Colorado, Iowa, Louisiana, Maryland, Minnesota and North Dakota (libel).

[11]Those States include Alaska, Connecticut, Montana, New Hampshire, Ohio, Oklahoma, South Dakota and Virginia.

proving special damages. Otherwise, there will be no uniform national standard for defamation arising in labor disputes.

CONCLUSION

For the foregoing reasons, Petitioners Beverly Enterprises, Inc. and Donald L. Dotson respectfully request that the Writ of Certiorari be granted.

Respectfully submitted,

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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

BEVERLY ENTERPRISES, INC. and DONALD L. DOTSON,
Petitioners,

v.

ROSEMARY TRUMP and SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585
Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Filed June 28, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-3222

BEVERLY ENTERPRISES, INC.;
DONALD L. DOTSON
Appellants

v.

ROSEMARY TRUMP;
SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 585

On Appeal From the United States District Court For the Western District of Pennsylvania
(D.C. Civil Action No. 97-cv-01490)
District Judge: Honorable Gary L. Lancaster

Argued December 11, 1998

BEFORE: BECKER, Chief Judge, and STAPLETON, Circuit Judges, and HARRIS,* District Judge

(Opinion Filed June 28, 1999)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

This diversity-based defamation action arises from statements allegedly made by a union representative about a company official during two separate incidents, one at a political rally and another at a "Town Hall meeting." The District Court dismissed the plaintiffs' complaint after finding the comments at the rally incapable of defamatory meaning and the Town Hall meeting comment protected under the doctrine of absolute testimonial immunity. Although for somewhat different reasons, we will affirm.

I.

There is a long-standing and acrimonious relationship between Beverly Enterprises, a national provider of nursing home care, and the

Service Employees International Union (''SEIU'') whose local affiliates represent a substantial number of Beverly's employees. Plaintiffs are Beverly Enterprises and Donald L. Dotson, Beverly's Senior Vice President for Labor and Employment. Before joining Beverly Enterprises Dotson had a prestigious career in labor relations, serving as Chairman of the National Labor Relations Board and as Assistant Secretary for Labor-Management Relations at the U.S. Department of Labor. This suit arises from two incidents in which Rosemary Trump, President of Local 585 of the SEIU, allegedly made false and defamatory statements about Dotson and Beverly. Plaintiffs allege that, as a result of the statements uttered by Trump, Dotson and Beverly have suffered damage to their reputations. A district court's order dismissing a complaint is subject to plenary review. *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.,* 998 F.2d 1192, 1997 (3d Cir. 1993). We accept as true all well-pleaded factual allegations in the plaintiffs' complaint and all reasonable inferences therefrom. *Independent Enterprises v. Pittsburgh Water,* 103 F.3d 1165, 1168 (3d Cir. 1997). The parties agree that Pennsylvania law governs this dispute.

II.

The first set of allegedly defamatory statements were made in August, 1996, at a political rally in Pittsburgh, Pennsylvania, sponsored by the Dole/Kemp presidential campaign. Plaintiffs allege that Trump approached Dotson in the midst of a large crowd, ascertained his identity as a Beverly official, and asked him whether he knew who she was. When Dotson said he did not, Trump became visibly upset, told Dotson he should know her, identified herself and then began to berate Dotson in a loud and angry voice. Specifically, Trump accused Dotson of being a ''criminal'' and said that ''you people at Beverly are all criminals.'' When Dotson tried to respond, Trump cut him off and angrily accused him of ''devoting [his] entire career to busting unions.'' Despite Dotson's efforts at reasoned discourse, Trump continued berating Dotson, finally shouting at him: ''I know your kind. You're just part of that World War II generation that danced on the graves of Jews.''

Plaintiffs allege that these statements were false and defamatory as to both Dotson and Beverly Enterprises. Moreover, they allege that Trump uttered the statements with actual malice, and that, as a result of these statements, Dotson suffered damage to his reputation. The District Court concluded that each of the three statements at the rally were incapable of defamatory meaning because they constituted mere hyperbole and insulting rhetoric, all too common in labor disputes.

We begin by addressing Trump's alleged statements accusing Dotson of "union-busting" and referring to Dotson and others at Beverly as "criminals." By statute in Pennsylvania a plaintiff in a defamation action has the burden of proving:

> (1) the defamatory character of the communication, (2) its publication by the defendant, (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication, and (7) abuse of any conditional privilege.

42 Pa. C. S. §8343(a) (West 1999).

The Pennsylvania Supreme Court has held that "[i]n an action for defamation, it is the court's duty to determine if the publication is capable of the defamatory meaning ascribed to it by the party bringing suit." *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996). "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." *Id.* at 1055 (quoting *Thomas Merton Center v. Rockwell Int'l Corp.*, 442 A.2d 213, 215 (Pa. 1981)).

Appellants contend that Trump's references to "criminals" and "union busting" were defamatory per se because they imputed criminal conduct to both Dotson and Beverly.[1] Moreover, they argue that other attendees at the Dole/Kemp rally within earshot could reasonably have interpreted Trump's statements as alleging actual facts about Dotson and Beverly.

We disagree. Although Trump's statements were undoubtedly offensive and distasteful, the law of defamation does not extend to mere insult. Courts in Pennsylvania and elsewhere have long recognized a distinction between actionable defamation and mere obscenities, insults, and other verbal abuse. "[S]tatements which are merely annoying or embarrassing or no more than rhetorical hyperbole or a vigorous epithet are

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[1]Insofar as plaintiffs' allegations can be construed as alleging slander per se, plaintiffs are excepted from the requirement that they must also allege special damages. *Baird v. Dun & Bradstreet,* 285 A.2d 166, 171 (Pa. 1971); *Clemente v. Espinosa,* 749 F. Supp. 672, 677 (E.D. Pa. 1990) (construing Pennsylvania law).

not defamatory." *Kryeski v. Schott Glass Techn., Inc.*, 626 A.2d 595, 601 (Pa. Super. 1993) (quoting *Redding v. Carlton*, 296 A.2d 880, 881 (Pa. Super. 1972)); *see also Greenbelt Cooperative Publishing Assoc. v. Bresler*, 398 U.S. 6, 14 (1970) (finding that a statement that was "no more than rhetorical hyperbole, a vigorous epithet" was not slander). As the Restatement (Second) of Torts explains:

> A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. Thus when, in the course of an altercation, the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not reasonably to be understood as asserting the fact that the plaintiff is of illegitimate birth but only to be abusing him to his face. No action for defamation will lie in this case.

Restatement (Second) of Torts §566, comment e (1977).

Similarly here, Trump's exclamation that "you people at Beverly are all criminals" is reasonably understood as a vigorous and hyperbolic rebuke, but not a specific allegation of criminal wrongdoing. Trump's accusation that Dotson "devot[ed] [his] entire career to busting unions" is equally incapable of a defamatory construction. Appellants describe these statements as "mean-spirited . . . accusations of illegal and immoral conduct." First, it is doubtful at best that an accusation of "union-busting" amounts to an insinuation of criminal activity. Even if it were so understood, however, the reasonable listener would recognize this statement as merely a vituperative outburst which, although undoubtedly offensive, it is not actionable in defamation. On this basis, we conclude that these two statements are incapable of defamatory meaning and thus cannot support an action in tort.

Plaintiffs' claim based on the third comment Trump allegedly made at the rally — that Dotson was "part of that World War II generation that danced on the graves of Jews" — fails for a different reason. As a rule, except as to allegations of slander per se, plaintiffs in slander actions must allege special damages beyond an injury to reputation. 42 Pa. C. S. §8343(a)(6); *Baird*, 285 A.2d at 171 ("[i]t is a general rule that defamatory words are not actionable, absent proof of special damage"); *Solosko v. Paxton*, 119 A.2d 230, 232 (Pa. 1956) ("[g]enerally speaking, damages for defamatory words when spoken are not recoverable in the absence of proof

of special damages''); *Altoona Clay Prod. Inc., v. Dun & Bradstreet, Inc.*, 246 F. Supp. 419, 422 (W.D. Pa. 1965), *rev'd on other grounds,* 367 F.2d 625 (3d Cir. 1966) (''The Pennsylvania cases require both the allegation and proof of [a] specific item of damage to support the recovery.''); Restatement (Second) of Torts, §558(d). Whereas the aforementioned comments arguably impute criminal conduct to the plaintiff, and thus constitute allegations of slander per se, this accusation of bigotry does not fall within the narrowly defined categories of per se defamation. *Clemente,* 749 F. Supp. at 677 (citing the four categories of slander per se as words imputing the commission of a criminal offense, a loathsome disease, business misconduct, or serious sexual misconduct).

Consequently, as to the alleged statement imputing anti-Semitism, to survive a motion to dismiss, the plaintiff must go beyond a claim of injury to reputation and allege special damages. Typically considered as a pecuniary loss, special damages are ''actual and concrete damages capable of being estimated in money, established by specific instances such as actual loss due to withdrawal of trade of particular customers, or actual loss due to refusal of credit by specific persons, all expressed in figures.'' *Altoona*, 246 F. Supp. at 422; Restatement (Second) of Torts, §575, comment b (special harm is ''the loss of something having economic or pecuniary value''). Because plaintiffs have only alleged damage to their reputation, they have failed to meet this requirement.[2]

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[2]Beverly also argues that it need not allege or prove special damages because Trump acted with actual malice. But Beverly confuses the requirements of *special* damages and *actual* damages. Under Pennsylvania law, where a defendant acts with actual malice, there is no need to prove actual damages. *See Frisk v. News Co.,* 523 A.2d 347, 354 (Pa. Super. Ct. 1986) (citing *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974)); *Agriss v. Roadway Express, Inc.,* 483 A.2d 456, 467-68 (Pa. Super. Ct. 1985). This rule requires that, in the absence of actual malice, even if the plaintiff need only prove general damage to reputation, as in a defamation per se case, he or she cannot rely on a presumption of damages; he or she must offer actual specific evidence of such general damages. This is different from the principle of special damages (proof of which is excused in defamation per se cases, *see Agriss,* 483 A.2d at 468-75.)

III.

The second incident in which plaintiffs allege that Trump made a defamatory statement was in May, 1997, at a "Town Hall meeting." According to the plaintiffs' complaint, the SEIU persuaded several members of Congress to convene the meeting in the Allegheny County Courthouse to discuss an item of federal legislation then pending in Congress. The bill, entitled the "Federal Procurement and Assistance Integrity Act," was designed to preclude businesses that are in violation of certain federal labor standards from obtaining federal contracts. Plaintiffs allege that the "true purpose" of the meeting was to provide a forum for disparaging Beverly Enterprises and, to that end, members of Congress were importuned to ask speakers about the adverse effects that the pending legislation would have on Beverly. Trump, an invited speaker, allegedly made the following statement in response to a question from Congressman Klink:

> CONGRESSMAN KLINK: Thank you. To Ms. Trump and Ms. Ford, just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at the other Beverly locations across the country? What transpired in Pennsylvania to make the situation here much worse?
>
> MS. TRUMP: Well this is one of the most unionized, heavily unionized Beverly states, if not the most unionized Beverly state. They operate approximately 42 facilities in Pennsylvania, 20 of which are organized and we have had a history of bargaining that went very well. *But quite frankly when President Clinton was elected and a new Chairman of the National Labor Relations [Board] was appointed, the former Chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government* and besides which, I could really — really this is conjecture on my part, but I can only assume that because they went out and recruited the former general counsel for the National Right to Work Committee. They decided that you're the largest chain of Beverly facilities, if we're able to break unionism in the Beverly chain, then, of course, it will have a ripple effect in the entire industry and the whole industry will operate nonunion.

Plaintiffs allege that the italicized statement by Trump is defamatory because it accuses Dotson of criminal violation of the Ethics in

Government Act, 18 U.S.C. §§201 *et seq.* (''EGA''). Specifically, plaintiffs allege that the ''gist or sting'' of Trump's statement is that Dotson (1) may have negotiated for employment with Beverly while Chairman of the NLRB, and (2) eventually represented Beverly in matters that were pending before the NLRB during his Chairmanship, both in criminal violation of federal government ethics laws. Further, plaintiffs allege that Trump's statement also implicates Beverly as a participant in a criminal conspiracy with Dotson toward these same ends. According to plaintiffs, these statements are false, defamatory, and slanderous per se, as accusations of criminal conduct. On the basis of this statement, Dotson and Beverly claim to have sustained damage to their reputations.

The District Court dismissed this claim after concluding that Trump enjoyed absolute testimonial immunity for her statement. Like absolute judicial immunity, the common law testimonial immunity provides that:

> A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

See Jennings v. Cronin, 389 A.2d 1183, 1185 (Pa. Super. Ct. 1978) (quoting and adopting §590A of the Restatement (Second) of Torts). After considering the scope, purpose, and format of the meeting, the District Court concluded that the meeting constituted a ''legislative proceeding'' for purposes of testimonial immunity. Moreover, because Trump was an invited speaker and made the allegedly defamatory statement in response to a question posed by a panel member, the District Court concluded that the statement was ''part of'' the legislative proceeding. Finding Trump's statement absolutely privileged, therefore, the Court dismissed plaintiffs' claim.

We see no need to consider the contours of absolute testimonial immunity in this case, however, because we find Trump's statement at the Town Hall meeting incapable of either of the defamatory constructions plaintiffs allege.[3] Whether a reasonable listener could have construed

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[3]Plaintiffs contend that the District Court erred by considering matters outside the pleadings without converting defendants' motion into one for summary judgment. *See* Fed.R.Civ.P. 12(b). Specifically, plaintiffs contend the District Court erroneously considered a videotape of the meeting and a copy of the pending legislation at issue. Plaintiffs thus assert that ''Dotson

Trump's statements as defamatory is a question of law to be determined by the court. *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir. 1978); *Thomas Merton Ctr.*, 442 A.2d at 215-16; Restatement (Second) of Torts, §614.

Plaintiffs allege that Trump's statement implicates Dotson and Beverly in violation of two separate provisions of the Ethics In Government Act. Construing the allegations in the complaint in the plaintiff's favor, as we must, we nonetheless find neither of these interpretations reasonable. First, the act prohibits an executive branch officer from "personally and substantially" participating in a quasi-judicial proceeding if the officer is

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and Beverly must be provided the opportunity to rebut the extrinsic materials relied on by the District Court, and discover Rule 56 evidence in support of their claims." Appellant's Brief at 23.

It is well-settled that in deciding a motion to dismiss, courts generally may consider only the allegations contained in the complaint, exhibits attached thereto, and matters of public record. *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). As the federal bill is a matter of public record, the District Court did not err in considering it before deciding defendants' motion to dismiss.

However, the District Court's opinion also reflects the Court's reliance on the videotape of the meeting, which was relevant to determining whether the meeting constituted a "legislative proceeding." For example, the District Court noted the relevance of several details only obtained from the videotape, such as one Congressman's opening words at the meeting, his reference to the meeting as a "field hearing," and the number of other members of Congress present as well as their relationship to the bill. Although "a court may consider an undisputedly authentic document that the defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document," such exception does not apply here. *See id.* This exception prevents "a plaintiff with a legally deficient claim [from surviving] a motion to dismiss simply by failing to attach a dispositive document on which it relied." *Id.* In this case, however, defendants offered the videotape (and the District Court considered it) in support of their affirmative defense of testimonial immunity. Because the plaintiff was not given an adequate opportunity for discovery or to submit rebuttal evidence, we will treat the District Court's decision as a 12(b)(6) dismissal and will disregard the videotape of the meeting in conducting our plenary review of that decision. *See Indep. Enterprises*, 103 F.3d at 1168 n.2.

also negotiating prospective employment with an organization that has a financial interest in that proceeding. *See* 18 U.S.C. §208. Plaintiffs' complaint alleges that Trump's statement asserts a violation of this provision insofar as she said that "when President Clinton was elected and a new Chairman of the National Labor Relations [Board] was appointed, the former chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door. . . ." We find this interpretation of Trump's statement unreasonable. Not only is there nothing in Trump's statement to suggest that Dotson simultaneously sought employment from Beverly and supervised cases involving Beverly, but Trump's statement suggests to us just the opposite: that Dotson did not approach Beverly until *after* he left his government job.

Second, the Ethics in Government Act restricts former federal officers from representing another individual or entity in a matter formerly under the officer's supervision. *See* 18 U.S.C. §207. Plaintiffs contend that Trump accused Dotson of violating this provision when she said, "Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly . . . than me since I have been supervising them on behalf of the government . . . ." Trump's statement, according to plaintiffs, amounts to an accusation that Dotson violated §207 of the EGA "by representing Beverly in matters that had been pending before the NLRB during his Chairmanship." Again, we fail to see how a reasonable hearer of the statement Trump allegedly made could interpret it as plaintiffs suggest.

Trump's statement undeniably implies that Dotson sought to capitalize on his knowledge of the NLRB's prosecutions of Beverly in an effort to obtain employment with Beverly. Moreover, given that Dotson was a Beverly Vice President at the time of the alleged statement, Trump's statement implies that Dotson successfully secured his job at Beverly on the basis of his knowledge of their ongoing litigation with the NLRB. However, none of these implications amounts to a violation of federal law — civil or criminal. Trump's comment simply does not state or imply that Dotson has done that which the EGA prohibits: making, with an intent to influence, a communication to or appearance before any department, agency, or court in connection with matters he previously supervised. *See* 18 U.S.C. 207(a)(2).

Unless Trump's statement is reasonably susceptible of a defamatory meaning, plaintiffs have failed to state a claim with respect to the Town

Hall meeting. *See Sarkees v. Warner-West Corp.*, 37 A.2d 544, 546 (Pa. 1944) ("If the words are not susceptible of the meaning ascribed to them by the plaintiff, and do not sustain the innuendo, the case should not be sent to a jury."); *McAndrew v. Scranton Republican Pub. Co.*, 72 A.2d 780, 783 (1950). We conclude that Trump's statement is incapable of conveying either of the defamatory meanings plaintiffs advance. Moreover, to the extent the statement is susceptible of another defamatory interpretation that does not constitute an accusation of criminal wrongdoing, such interpretation would not constitute slander per se and, as a result plaintiff's complaint would be insufficient for failure to allege special damages.

IV.

Accordingly, we will affirm the order of the District Court dismissing the plaintiffs' complaint for failure to state a claim.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BEVERLY ENTERPRISES, INC.
and DONALD L. DOTSON,
Plaintiffs,

v.

ROSEMARY TRUMP and THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 585,
Defendants

Civil Action No. 97-1490

MEMORANDUM

LANCASTER, J.

March 5, 1998

This is an action in defamation. Plaintiffs, Beverly Enterprises Inc. ("Beverly"), and its Senior Vice-President for Labor and Employment, Donald L. Dodson, allege that defendant, Rosemary Trump, defamed them on two separate occasions: first, at a political rally for the Dole-Kemp presidential campaign in August, 1996; and second, at a Town Hall meeting at the Allegheny County Courthouse in May, 1997. Plaintiffs seek money damages.

Defendants have filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6). Defendants contend that the statements Ms. Trump allegedly made at the Dole-Kemp rally are, as a matter of law, incapable of defamatory meaning. They further contend that the statements she made at the Town Hall meeting enjoy absolute testimonial immunity.

For the reasons that follow, the motion will be granted.

I. STANDARD OF REVIEW

When the court considers a Rule 12(b)(6) motion to dismiss, the issue is not whether the plaintiff will prevail in the end or whether recovery appears to be unlikely or even remote. The issue is limited to whether, when viewed in the light most favorable to the plaintiff, and with all well-pleaded factual allegations taken as true, the complaint states any valid claim for relief. *See ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994).

In deciding a 12(b)(6) motion to dismiss, courts consider the allegations contained in the complaint, exhibits attached to the complaint, and matters of public record. *See* 5A Wright & Miller, *Federal Practice and Procedure* § 1357 n.40. A court may also consider any irrefutably authentic documents that a defendant attaches as an exhibit to the motion to dismiss if the plaintiff's claim is based in whole or in part on the documents. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

Accordingly, in deciding defendants' motion, the court has considered, in addition to plaintiffs' complaint, a copy of the Federal Procurement and Assistance Integrity Act ("HR 1624"). The court has also considered a video-tape of the May, 1997, Town Hall meeting at which Ms. Trump is alleged to have made some of the defamatory statements on which plaintiffs' claim is based. Both of these items were attached to the motion to dismiss.

II. DISCUSSION

A. The Dole-Kemp Rally

These defamation claims stem from a long-standing acrimonious labor dispute between Beverly, the nation's largest private provider of nursing home care, and the Service Employees International Union ("SEIU"), whose local affiliates represent a substantial number of Beverly's employees. Rosemary Trump is the president of Local 585 of the SEIU. The dispute has led to a series of strikes, lockouts, and the filing of charges and counter charges of unfair labor practices with the National Labor Relations Board. Defendants contend that the statements Ms. Trump allegedly made at the Dole-Kemp rally were uttered in the midst of the labor dispute, were mere rhetorical insults not to be taken literally, and are not actionable as defamation. The court agrees.

In a defamation claim, the court must first determine, as a matter of law, whether the publication is capable of defamatory meaning. *See Thomas Merton Center v. Rockwell Int'l Corp.*, 442 A.2d 213, 215-16 (Pa. 1981). The burden is on the complaining party to establish that the publication being challenged is defamatory. If the court concludes that the publication is not capable of defamatory meaning, the case will be dismissed. *See MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996).

Pertinent here, is that the courts recognize that there is a difference between defamatory statements, which are actionable in tort, and mere obscenities, insults, or other verbal abuse, which are not. *See Kryeski v. Schott-Glass Tech.*, 622 A.2d 595, 601 (Pa. Super. Ct. 1993). The courts generally consider insults, uttered face-to-face in anger, to be incapable of defamatory meaning. Indeed:

> There are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse. A certain amount of name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult.

Restatement (Second) of Torts § 566 cmt. e (1976). This is particularly true in cases where the insults were uttered in the midst of an acrimonious labor dispute. *See Old Dominion Branch No. 496 Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 268 (1974) (not defamation to refer to non-union worker as "scab," and to characterize him, among other things, as a "traitor to his God, his country, his family, and his class"); *Crawford v. United States Steelworkers*, 335 S.E.2d 828, 839 (Va. 1985) (not defamation to refer to management as "cocksucker" and "motherfucker"); *Yeager v. Local Union 20*, 453 N.E.2d 666, 667, 669 (Ohio 1983) (not defamation to refer to employer as a "Little Hitler" operating a "Nazi concentration camp").

In this case, the parties agree that the Dole-Kemp rally was held in the midst of the ongoing and long-standing acrimonious labor dispute between Beverly and the SEIU. Further, accepting plaintiffs' allegations as true, Ms. Trump, without provocation, angrily confronted Mr. Dodson at the rally. The confrontation escalated to the point where she shouted insults at Mr. Dodson and accused him of being a criminal by saying, "You people at Beverly are all criminals." She then accused Dodson of "devoting [his] entire career to busting unions." Finally, she shouted at Dodson, "I know your kind. You're just part of that World War II generation that danced on the graves of Jews."

We need not dwell on this issue at length. Ms. Trump's statements, distasteful as they were, were mere hyperbole and insulting rhetoric that are

unfortunately commonplace in labor disputes. It is unreasonable, within the context of the labor dispute, to find that any person would have understood that these statements were to be taken literally. [1] The statements made by Ms. Trump at the Dole-Kemp rally, in the context of their publication, rise no higher than rhetorical hyperbole uttered in the heat of anger and stemming from an ongoing labor dispute. They are incapable of defamatory meaning as a matter of law.

B. The Town Hall Meeting

Defendants also move to dismiss plaintiffs' claim with respect to statements that Ms. Trump made at the May, 1997, Town Hall meeting. Defendants contend that her statements enjoy absolute testimonial immunity. The dispositive issue court must decide is whether the Town Hall meeting was a legislative proceeding within the meaning of the Restatement (Second) of Torts §590A (1976). The court concludes that it was.

Plaintiffs' defamation claim is based on Pennsylvania law; therefore, we look to Pennsylvania law to determine whether defendants' immunity defense is valid. *See Lunderstadt v. Colafella*, 885 F.2d 66, 74 (3d Cir. 1989). Pennsylvania has adopted section 590A of the Restatement (Second) of Torts as its common law. *See Jennings v. Cronin*, 389 A.2d 1183 (Pa. Super. Ct. 1978). That section provides, "A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding." *Id.* at 1185. This testimonial immunity is absolute and similar in all respects to that afforded a witness in a judicial proceeding. *See id.*; Restatement (Second) of Torts §590A cmt. a (1976).

The purpose of affording absolute immunity to witnesses who appear before a legislative proceeding is to permit the witnesses to give their legislators fully candid testimony regarding the advisability of proposed legislation. The immunity permits them to do so without the inhibiting or chilling effect that the threat of being hauled into civil court

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[1] If we accept that Ms. Trump plainly accused Dodson of being anti-Semitic, the Pennsylvania courts have been consistent in holding that an allegation of bigotry is, without more, not actionable in defamation. Plaintiffs' reliance on the obvious dicta in *MacElree* does not support their claim. *See* 674 A.2d at 1055 (Cappy, J., concurring).

on a defamation suit would pose. The value of the privilege to our representative form of government is obvious, necessary, and substantial.

What constitutes a legislative proceeding, however, is not clearly defined. What is clear, however, is that a legislative proceeding is not limited to those proceedings that embody the formal speech and debate on proposed legislation that is held on the floor of the legislative chamber. *See Lunderstadt*, 885 F.2d at 73 (''Legislative immunity is not limited to words spoken in legislative sessions.''). Nor is a legislative proceeding limited to an official hearing called by a legislative body, or by duly formed committees of that body, where witnesses are compelled to appear and testify under oath. *See Yip v. Pagano*, 606 F. Supp. 1566, 1570 (D.N.J. 1985) (citing authority).

Neither the Supreme Court of Pennsylvania nor the Court of Appeals for the Third Circuit has directly ruled on what constitutes a ''legislative proceeding.'' We find, however, some guidance in the court of appeals' decision in *Government of the Virgin Islands v. Lee*, 775 F.2d 514 (3d Cir. 1985). In *Lee*, the court of appeals held that informal investigative fact-finding is included within the type of activity protected by legislative immunity. *See id.* at 520-22. In so holding, the court of appeals made clear that ''fact-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation. As such, fact-finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity.'' *Id.* at 521. Although *Lee* was based on a specific statute that afforded immunity to the Virgin Islands' legislators, the court's reasoning is instructive in this case. *See also Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975) (noting that the power to investigate falls within the legislative sphere and is protected).

After a review of the applicable authorities, the court holds that the definition of a legislative proceeding is broad enough to encompass proceedings — including informal factfinding, information gathering, or investigative activities — that are conducted by legislators with the objective purpose of aiding the legislators in the drafting, debating, or adopting of proposed legislation.

In this case, the Town Hall meeting was held in the Allegheny County Courthouse. The stated purpose of the meeting was to allow the local members of Congress to hear testimony regarding the utility of HR 1624, which was then pending before the United States Congress, and how adoption of HR 1624 might affect Beverly's operations. HR 1624, if

adopted, would authorize the Secretary of Labor to suspend or debar a business from being awarded a procurement contract with the federal government if it were determined that the business had violated, among other provisions, the National Labor Relations Act, 29 U.S.C. 151 *et seq.* Indeed, Representative William J. Coyne opened the meeting by referring to it as a "field hearing" and stated, "This hearing should provide us with a better understanding of the nature and magnitude of the problem, as well as the best options for dealing with federal contractors who have long histories of violating federal labor and workplace safety laws."

Representative Lane Evans, who drafted HR 1624, presided at the Town Hall meeting. In addition to Representative Evans, the congressional panel consisted of Representatives William J. Coyne, Michael F. Doyle, Frank Mascara, and Ronald Klink, all of whom were co-sponsors of HR 1624. United States Senator Arlen Spector also attended a portion of the meeting.

Thirteen individuals were invited to speak before the panel. The speakers included, among others, labor leaders, workers, attorneys, and educators. In accordance with the meeting's general format, each of the congressmen made an opening statement regarding the scope and intent of HR 1624. Each of the witnesses then gave prepared remarks, and thereafter, responded to specific questions from the congressional panel.

We have considered each of plaintiffs' arguments regarding the immunity issue. Moreover, we accept as true plaintiffs' averment that the Town Hall meeting was not a meeting of the congressional committee that was assigned the task of considering HR 1624. We also accept as true that none of the congressmen in attendance were members of the assigned committee. We find, however, that these averments are immaterial to the immunity issue, and are therefore insufficient to withstand defendants' motion to dismiss.

Nor is the court persuaded by plaintiffs' contention that Fed.R.Civ.P. 12(b)(6) dictates that the court accept as true the averment made in plaintiffs' complaint that the Town Hall meeting was not a legislative proceeding. Rule 12(b)(6) obligates the court to accept as true plaintiffs' averments of fact, but the court is not obligated to adopt plaintiffs' conclusions of law. Whether the Town Hall meeting was a legislative proceeding within the meaning of section 590A is a question of law; thus, plaintiffs' averment enjoys no presumption of validity.

The court is satisfied that the Town Hall meeting was a legislative proceeding within the meaning of section 590A of the Restatement. The court is also satisfied that Ms. Trump's statements were made as a part of that legislative proceeding. She was one of the thirteen individuals who were invited to speak before the congressional panel. She gave a statement and then answered questions from the panel. The statement that plaintiffs find objectionable was clearly relevant to the stated purpose of the meeting; indeed, it was made in direct response to a question posed by Representative Klink.

Moreover, contrary to plaintiffs' contention, it does not matter whether Ms. Trump had a subjective sinister motive for taking part in the Town Hall meeting. Testimonial immunity is absolute, it stands even if the witness acted in bad faith, or with a corrupt motive. *See Lunderstadt*, 885 F.2d at 74 (noting that statements made with an unworthy purpose in a legislative proceeding do not destroy legislative immunity and that courts are not the proper place to sort out controversies surrounding dishonest or vindictive motives attributed to legislative conduct).

III. CONCLUSION

The motion to dismiss will be granted. The appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BEVERLY ENTERPRISES, INC.
and DONALD L. DOTSON,
Plaintiffs,

v.

ROSEMARY TRUMP and THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 585,
Defendants.

Civil Action No. 97-1490

ORDER

AND NOW, this 5th day of March, 1998, upon consideration of the motion to dismiss [Document #3], IT IS HEREBY ORDERED that the motion is GRANTED. The Clerk of Court is directed to mark the case closed.

BY THE COURT:

_____, J.

cc: All Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BEVERLY ENTERPRISES, INC., ET AL.,
Plaintiffs,

v.

ROSEMARY TRUMP, ET AL.,
Defendants

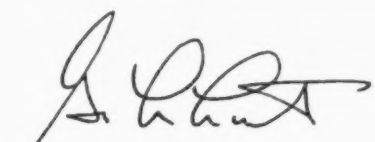
Civil Action No. 97-1490

ORDER

AND NOW, this 9th day of February, 1998, IT IS HEREBY ORDERED as follows:

1. Civil Action No. 97-2356 is consolidated with Civil Action No. 97-1490, the lead case captioned above.
2. All pleadings, motions, and other papers hereafter filed shall be filed at Civil Action No. 97-1490.
3. The Clerk of Court shall close Civil Action No. 97-2356.

BY THE COURT:



_____, J.

cc: All Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3222

BEVERLY ENTERPRISES, INC.; DONALD L. DOTSON,
Appellants

v.

ROSEMARY TRUMP; SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585
(D.C. Civ. No. 97-cv-01490)

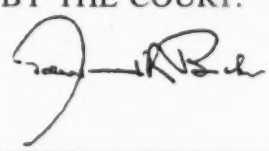
Present: BECKER, *Chief Judge,* SLOVITER, MANSMANN
GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH
McKEE, RENDELL, STAPLETON,* *Circuit Judges,* and
HARRIS,* *District Judge.*

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petitions for rehearing filed by the Appellants and having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petitions for rehearing are

DENIED.

BY THE COURT:



Chief Judge

DATED: July 30, 1999
gs/cc: MTM
CD
HCB
KWK

*As to panel rehearing only.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 151 Findings and Policies

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection of law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 158(c)

Section 8.(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

ETHICS IN GOVERNMENT ACT
18 U.S.C. § § 207, 208, 216

§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

(a) Restrictions on all officers and employees of the executive branch and certain other agencies. (1) Permanent restrictions on representation on particular matters. Any person who is an officer or employee . . . of the executive branch of the United States . . . and who, after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —

> (A) in which the United States . . . is a party or has a direct and substantial interest,
>
> (B) in which the person participated personally and substantially as such officer or employee, and
>
> (C) which involved a specific party or specific parties at the time of such participation,
>
> shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility. Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —

(A) in which the United States . . . is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States . . . and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

* * *

(c) One-year restriction on certain senior personnel of the executive branch and independent agencies. (1) Restrictions. In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee . . . of the executive branch of the United States . . . who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person . . . in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee . . . in a judicial or other proceeding . . . in which, to his knowledge, any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

> Shall be subject to the penalties set forth in section 216 of this title.

§ 216. Penalties and injunctions

(a) The punishment for an offense under section . . . 207, 208 . . . of this title is the following:

> (1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.
>
> (2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.

(b) The Attorney General may bring a civil action . . . against any person who engages in conduct constituting an offense under section . . . 207, 208 . . . of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BEVERLY ENTERPRISES, INC.
5111 Rogers Avenue
Fort Smith, Arkansas 72919,

and

DONALD L. DOTSON
5111 Rogers Avenue
Fort Smith, Arkansas 72919,
Plaintiffs,

v.

ROSEMARY TRUMP
237 Sixth Street
Pittsburgh, Pennsylvania 15218,
Defendant.

Civil No.: 97 1490

COMPLAINT FOR DAMAGES

NOW COME the Plaintiffs Beverly Enterprises, Inc. and Donald L. Dotson and, for their Complaint against Defendant Rosemary Trump, state as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Beverly Enterprises, Inc. (hereinafter "Beverly") is a corporation with its principal place of business located at 5111 Rogers Avenue, Fort Smith, Arkansas.

2. Plaintiff Donald L. Dotson (hereinafter "Dotson") is an individual of the full age of majority and a resident of the State of Arkansas.

3. Defendant Rosemary Trump (hereinafter "Trump") is, upon information and belief, an individual of the full age of majority and a resident of the State of Pennsylvania. While Trump, at all times relevant to the facts giving rise to this dispute, served as President of Local 585, Service Employees International Union, she is being sued only as an individual for acts taken in her personal capacity and not in her official capacity as President of SEIU Local 585.

4. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1332 in that complete diversity of citizenship exists between all Plaintiffs and all

Defendants and the amount in controversy exceeds $75,000.00, exclusive of interest and costs.

5. Venue is proper in this Court pursuant to 28 U.S.C. §1391(a)(1) in that the Defendant resides in this judicial district and pursuant to 28 U.S.C. §1391(a)(2) in that a substantial portion of the events or omissions giving rise to this action occurred within this judicial district.

GENERAL BACKGROUND ON BEVERLY AND THE SEIU

6. Beverly is the nation's largest private provider of nursing home care.

7. Beverly and the Service Employees International Union (hereinafter "SEIU") have been embroiled in a long-standing dispute over the SEIU's local affiliates' representation of Beverly employees. The dispute finds its origins in the mid-1980s when the SEIU first targeted Beverly homes for unionization.

8. During the course of its efforts to unionize Beverly employees, the SEIU has filed innumerable unfair labor practice charges against Beverly with the National Labor Relations Board (hereinafter "NLRB"). Included among these were a series of charges dating back to 1986 that led to a decision by the NLRB in *In re Beverly California Corp.*, 310 NLRB No. 37 (1993), commonly known as "Beverly I". The Administrative Law Judge rendered his decision in Beverly I on November 9, 1990. The NLRB issued its decision on January 20, 1993. The Second Circuit, in *Torrington Extend-A-Care Employee Assoc. v. National Labor Relations Board*, 17 F.3d 580 (2d Cir. 1994), reversed the NLRB's decision and remanded the case for further proceedings on February 28, 1994.

9. After realizing that traditional union activities would not be effective in its dealings with Beverly, the SEIU, during the 1980s, decided to launch a "corporate campaign" against Beverly. Such campaigns are designed to use external pressure on a company and its top policy-makers through non-traditional union tactics in order to influence the company's strategic business decisions.

10. Among the many tactics used in a corporate campaign are attacks on the management of the company designed to discredit the company. In the case of Beverly, in addition to its efforts to impugn management, the SEIU has falsely portrayed Beverly as anti-worker, anti-consumer, unsafe and greedy; appealed to government agencies to investigate alleged bad

practices; petitioned legislators to bring political pressure to bear upon the company; and used media strategies to encourage repetition of false and defamatory articles.

11. The SEIU's goals in implementing its corporate campaign against Beverly were two-fold. First, the SEIU wanted Beverly to capitulate into recognizing its local affiliates, without representation elections conducted by the NLRB and to deprive Beverly employees of their right to choose freely whether they wish to be represented by the SEIU. Second, the SEIU wanted to bring economic pressure to bear on Beverly using non-traditional means to coerce Beverly into agreeing to terms and conditions of collective bargaining agreements that Beverly would not otherwise have agreed to in the face of traditional labor pressures such as strikes.

BACKGROUND ON BEVERLY AND THE SEIU IN PENNSYLVANIA

12. Beverly subsidiaries own and/or operate forty-two nursing home facilities in Pennsylvania. Of those forty-two nursing homes, twenty have employees that are represented by local affiliates of the Service Employees International Union, either District 1199P, Local 585, and Local 688.

13. The last of the Collective Bargaining Agreements covering Beverly's unionized Pennsylvania nursing homes expired on November 30, 1995. Following the expiration of those agreements, Beverly and the SEIU engaged in collective bargaining, but initially were unable to agree on the terms and conditions of new Collective Bargaining Agreements. During these negotiations, the SEIU continued to wage its corporate campaign against Beverly in an effort to force Beverly to agree to terms proposed during the negotiations.

14. One of the principal aims of the SEIU during these negotiations was to obtain a master contract that would apply to all unionized Beverly homes in Pennsylvania. Beverly was not amenable to this proposal, preferring instead to have individual agreements that were tailored to suit the specific needs of each facility. Indeed, since early Fall of 1995, each Beverly unionized facility had in place a negotiating team that repeatedly sought facility-specific negotiations. Notwithstanding, the SEIU appointed one Chief Negotiator for all twenty facilities, had a "state-wide" bargaining committee composed of approximately 100 representatives from all twenty facilities, and avowedly sought a "Master Contract" to cover all twenty facilities.

15. On March 15, 1996, the SEIU gave notice to Beverly of its intention to engage in a three-day strike. Although the ostensible basis for the strike was to protest unfair labor practices, the three-day strike was, in fact, simply another component of the SEIU's corporate campaign and was done principally in the hope that it would force Beverly to accede to the SEIU's demands at the bargaining table.

16. Under §8(g) of the National Labor Relations Act, the SEIU was required to give ten days advance notice of its intended strike so that Beverly could make arrangements for temporary employees to ensure that essential health care services to its residents were not adversely affected by the strike.

17. The notice initially received by Beverly indicated that the strike would commence at 7:00 a.m. on Friday, March 29, 1996. Subsequently, at the last minute, on Wednesday, March 27, 1996, Beverly received notice that the commencement of the strike had been postponed until 6:00 a.m. on Monday, April 1, 1996. The sudden change interfered with the arrangements that Beverly had made for temporary employees. In addition, because the second notice arrived only five days before the strike, it failed to provide the required ten-days notice and thus the strike was unlawful. Beverly advised the SEIU that the second notice did not fulfill the requirements of §8(g) and that it would consider any strike held pursuant to the second notice to be unlawful. Despite Beverly's lack of consent to the notice, on April 1, 1996, at 7:00 a.m., fifteen of the twenty unionized facilities were struck.

18. Once the strike commenced, Beverly engaged permanent replacement workers in order to ensure that critical health care services were not interrupted to its residents or their welfare jeopardized during the strike. At the conclusion of the strike, when the strikers offered to return to work, Beverly concluded that it was more appropriate from a business standpoint for the replacement workers to remain in their positions and for the company to recall former workers on an as-needed basis. Between April, 1996 and January, 1997, Beverly recalled approximately 290 of the strikers to their former positions and another 237 were recalled to different positions.

19. Nevertheless, on July 8, 1996, the NLRB filed a §10(j) injunction action against Beverly, seeking an order directing it to recall all of the strikers to their former positions. On April 4, 1997, the United States District Court for the Western District of Pennsylvania concluded that

Beverly should, in fact, recall the former strikers. That decision is now on appeal to the United States Court of Appeals for the Third Circuit.

20. After extensive negotiations, Beverly and the SEIU were able to reach agreement in early June, 1997, on new Collective Bargaining Agreements at all of the twenty Beverly nursing homes with employees represented by the SEIU. Beverly, however, continues to remain the target of a corporate campaign by the SEIU.

BACKGROUND ON DOTSON AND THE ETHICS IN GOVERNMENT ACT

21. In 1982, Dotson was nominated by President Ronald W. Reagan to serve as Chairman of the NLRB. On February 18, 1993, the United States Senate confirmed Dotson's nomination, and he assumed his duties immediately thereafter.

22. Prior to his nomination to be Chairman of the NLRB, Dotson had served as Assistant Secretary of Labor for Labor-Management Relations, United States Department of Labor. Before entering government service, Dotson had been Chief Labor Counsel for Wheeling-Pittsburgh Steel Corporation, Labor Counsel for Westinghouse Electric Corporation, and Labor Counsel for Western Electric Company.

23. As an employee of the federal government, Dotson was subject to the provisions of the Ethics in Government Act, which is codified in part at 18 U.S.C. §§ 207, 208, and 216. Among other things, the Act imposes restrictions in the scope of former government employees' post-government service employment. In particular, the Act permanently prohibits former government employees from knowingly making appearances before any government representative or agency in matters on which the former employee was personally and substantially involved; prohibits former government employees for a period of two years from knowingly making appearances before any government representative or agency in a matter that was pending under the former employee's official responsibility for the one-year period prior to his departure from government service; restricts senior employees of the executive branch for one year after they leave government service from knowingly making appearances before any government representative or agency in which the former employee seeks official government action; and restricts the conditions under which government employees may negotiate for post-government employment. Viola-

tions of the Act are felonies, punishable by up to five years imprisonment for a willful violation and a fine up to $50,000.00.

24. In their current form, those provisions provide in pertinent part as follows:

§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

> **(a) Restrictions on all officers and employees of the executive branch and certain other agencies.** (1) Permanent restrictions on representation on particular matters. Any person who is an officer or employee . . . of the executive branch of the United States . . . and who, after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —
>
> > (A) in which the United States . . . is a party or has a direct and substantial interest,
> >
> > (B) in which the person participated personally and substantially as such officer or employee, and
> >
> > (C) which involved a specific party or specific parties at the time of such participation,
>
> shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility. Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —

> (A) in which the United States . . . is a party or has a direct and substantial interest,
>
> (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such

officer or employee within a period of 1 year before the termination of his or her service or employment with the United States . . . and

(C) which involved a specific party or specific parties at the time it was so pending.

shall be punished as provided in section 216 of this title.

***

(c) **One-year restriction on certain senior personnel of the executive branch and independent agencies**. (1) Restrictions. In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee . . . of the executive branch of the United States . . . who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person . . . in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee . . . in a judicial or other proceeding . . . in which, to his knowledge, any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest —

Shall be subject to the penalties set forth in section 216 of this title.

§ 216. Penalties and injunctions

(a) The punishment for an offense under section . . . 207, 208 . . . of this title is the following:

(1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.

> (2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.
>
> (b) The Attorney General may bring a civil action . . . against any person who engages in conduct constituting an offense under section . . . 207, 208 . . . of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater.

25. Dotson's tenure as Chairman of the NLRB ended on December 16, 1987.

26. Dotson entered the private practice of law as a partner with Keck, Mahin & Cate in Washington, D.C. on December 17, 1987.

27. In May, 1991, Dotson accepted employment with Beverly as its Vice-President and Deputy General Counsel and subsequently became its Senior Vice-President for Labor and Employment.

28. At all times relevant to the events described hereinafter, Dotson continued in his capacity as Beverly's Senior Vice-President for Labor and Employment.

COUNT I — THE DOLE/KEMP RALLY

29. Plaintiffs incorporate, as if rewritten herein in full, the allegations of Paragraphs 1 through 28, inclusive.

30. On Sunday, August 18, 1996, Defendant Trump confronted Dotson in Point State Park in Pittsburgh, Pennsylvania where a large crowd had gathered for a rally attended by Republican presidential candidate Bob Dole and vice-presidential candidate Jack Kemp.

31. Trump approached Dotson; ascertained that he was with Beverly; ascertained his identity; inquired as to whether Dotson knew who she was; and became visibly upset and irate when Dotson said he did not know who she was.

32. Trump told Dotson that he should have known who she was and then identified herself as Rosemary Trump, President of SEIU Local 585. Unprovoked, she then began to berate Dotson in a loud and angry voice,

easily overheard by other people nearby. Trump accused Dotson of being a "criminal" and said that "you people at Beverly are all criminals".

33. Without raising his voice, Dotson attempted to respond to Trump's loud accusations. Trump cut him off and angrily accused him of "devoting (his) entire career to busting unions".

34. Trump was resistant to reasoned discourse by Dotson in response to her accusations. She would not shut up, and she would not go away. Finally, she shouted at Dotson:

> "I know your kind. You're just part of that World War II generation that danced on the graves of Jews."

35. Trump's statements concerning Dotson are false and defamatory and imply false and defamatory statements of fact concerning Dotson.

36. The gist of Trump's defamation against Dotson is that he is anti-Semitic; that he is a criminal; and that he has devoted his entire professional career to illegal and criminal conduct, the purpose of which is to "bust" unions.

37. Trump's defamatory statements about Dotson were made without privilege, either statutory or constitutional in nature.

38. Trump's defamatory statements concerning Dotson are not protected expressions of opinion because they are based on the existence of objectively provable facts, and even if Trump's statements were considered "opinion", they are nevertheless actionable because they imply the existence of undisclosed defamatory facts.

39. Trump acted with constitutional malice in making the defamatory statements at issue in that she made such statements either with actual knowledge of the falsity of those statements, or with reckless disregard as to the truth of those statements.

40. Based on the foregoing, Dotson has suffered damage to his reputation and good name as a direct and proximate result of Trump's malicious, defamatory statements, all in an amount to be established at the trial of this matter.

41. Trump's defamatory statements about Dotson were spoken willfully, maliciously, in bad faith with ill will, wantonly and recklessly, and with actual malice.

COUNT II — THE TOWN HALL MEETING

42. Plaintiffs incorporate, as if rewritten herein in full, the allegations of Paragraphs 1 through 41, inclusive.

43. The SEIU persuaded several members of the minority Democratic party in the United States Congress to whom it has given support in the past to convene a ''town hall'' meeting in the Allegheny County Courthouse to hear unsworn statements concerning H.R. 1624, the ''Federal Procurement and Assistance Integrity Act'', a bill proposed by the ranking minority member of the House Veterans Affairs Committee.

44. The true purpose of this ''town hall'' meeting was to provide a forum designed solely to attack Beverly and assist the SEIU in their campaign to cause economic harm to Beverly and its nursing homes in Pennsylvania.

45. This ''town hall'' meeting was not an official Congressional hearing, but was given the trappings of one to mislead the public, and was simply an informal meeting organized by the SEIU and several members of the minority party in Congress to hear statements from invited speakers on how H.R. 1624 would affect Beverly's existing contracts with the Veteran's Administration and why causing economic harm to Beverly would be a good thing for the SEIU.

46. Defendant Trump was one of the persons invited to appear and speak during the ''town hall'' meeting.

47. During the ''town hall'' meeting, Trump delivered a statement and responded to questions from the Members of Congress in attendance.

48. Among the questions to and answers by Trump was the following:

CONGRESSMAN KLINK: Thank you. To Ms. Trump and Ms. Ford, just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at the other Beverly locations across the country? What transpired in Pennsylvania to make the situation here much worse?

MS. TRUMP: Well, this is one of the most unionized, heavily unionized Beverly states, if not the most unionized Beverly state. They operate approximately 42 facilities in Pennsylvania, 20 of which are organized and we have had a history of bargaining that went very well. *But quite frankly when President Clinton was elected and a new Chairman of the National Labor Relations was appointed, the former Chairman, Don*

Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government and besides which, I could really — really this is conjecture on my part, but I can only assume that because they went out and recruited the former general counsel for the National Right to Work Committee. They decided that you're the largest chain of Beverly facilities, if we're able to break unionism in the Beverly chain, then, of course, it will have a ripple affect in the entire industry and the whole industry will operate nonunion.

That's my opinion, of course. I can't obviously produce any evidence to that effect, but the reality is that since the former Chairman of the National Labor Relations Board, Don Dotson, and the former general counsel of the National Right to Work Committee was hired by Beverly in the last three-year period, it's been very clear that this is not about business, this is about ideology and the ideology is, frankly, is to pretend that the National Labor Relations Act passed in 1935 never happened. (Emphasis added).

49. The "gist" or "sting" of Trump's statements concerning Dotson include that Dotson may have negotiated for employment with Beverly during his tenure as Chairman of the NLRB in criminal violation of federal ethics laws described above and that Dotson, following his departure from government employment, engaged in criminal activities prohibited by federal ethics laws by representing Beverly in matters that had been pending before the NLRB during his Chairmanship in violation of federal ethics laws described above.

50. The "gist" or "sting" of Trump's statements concerning Beverly include that Beverly itself engaged in and/or aided and abetted a criminal conspiracy by helping Dotson to engage in criminal activities in violation of federal ethics laws described above.

51. Trump's statements concerning the circumstances of Dotson's employment with Beverly and Beverly's employment of Dotson are false and defamatory and/or imply false and defamatory statements of fact concerning Dotson and Beverly.

52. Trump's statements accuse Dotson and Beverly of criminal conduct in violation of the Ethics in Government Act as described above and, as such, are defamatory *per se* under applicable Pennsylvania law.

53. Trump's statements were made without privilege, be it statutory, common law, or constitutional in nature.

54. Trump's defamatory statements concerning Dotson are not protected expressions of opinion because they are based on the existence of objectively provable facts, and even if Trump's statements were considered "opinion", they are nevertheless actionable because they imply the existence of undisclosed defamatory facts.

55. Trump's statements were made to members of Congress, media and the general public assembled at the "town hall" meeting and were understood by those recipients to be of and concerning Dotson and Beverly. Furthermore, the recipients understood the defamatory meaning of Trump's statements.

56. Trump acted with constitutional malice in making the defamatory statements at issue, in that she made such statements either with actual knowledge of the falsity of those statements or with reckless disregard as to the truth of those statements.

57. Based on the foregoing, Dotson and Beverly have sustained damage to their reputation and good name in an amount to be established at the trial of this matter.

58. Trump's defamatory statements about Dotson and Beverly that were done willfully, maliciously, in bad faith, with ill will, wantonly and recklessly, and with actual malice.

WHEREFORE, Plaintiffs Donald L. Dotson and Beverly Enterprises, Inc. respectfully request that this Honorable Court grant them the following relief:

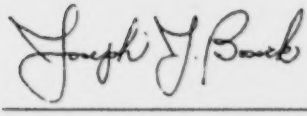
I. As to Count I, judgment in favor of Plaintiff Donald L. Dotson and against Defendant Rosemary Trump in a sum in excess of $75,000.00, plus legal interest and costs;

II. As to Count II, judgment in favor of Plaintiff Donald L. Dotson and against Defendant Rosemary Trump in a sum in excess of $75,000.00, plus legal interest and costs;

III. As to Count III, judgment in favor of Plaintiff Beverly Enterprises, Inc. and against Defendant Rosemary Trump in a sum in excess of $75,000.00, plus legal interest and costs; and

IV. As to all Counts, for such other and further legal and equitable relief as this Court may deem just and proper under the premises.

Respectfully submitted,



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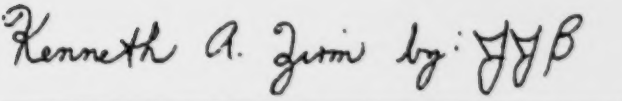

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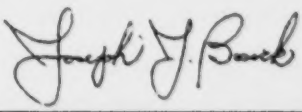
JURY DEMAND

Plaintiffs hereby demand a trial by jury.



Joseph J. Bosick (P.A.I.D. #17241)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BEVERLY ENTERPRISES, INC,
5111 Rogers Avenue
Fort Smith, Arkansas 72919

and

DONALD L. DOTSON,
5111 Rogers Avenue
Fort Smith, Arkansas 72919
Plaintiffs,

vs.

SERVICE EMPLOYEES
INTERNATIONAL
UNION, LOCAL 585,
237 6th Street
Pittsburgh, Pennsylvania 15218
Defendant.

Civil No.:

COMPLAINT FOR DAMAGES

NOW COME the Plaintiffs Beverly Enterprises, Inc. and Donald L. Dotson and, for their Complaint against Defendant Service Employees International Union, Local 585, state as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Beverly Enterprises, Inc. (hereinafter "Beverly") is a corporation with its principal place of business located at 5111 Rogers Avenue, Fort Smith, Arkansas.

2. Plaintiff Donald L. Dotson (hereinafter "Dotson") is an individual of the full age of majority and a resident of the State of Arkansas.

3. Defendant Service Employees International Union, Local 585 (hereinafter "Local 585") is an unincorporated labor organization with its principal place of business located at 237 6th Street, Pittsburgh, Pennsylvania.

4. Rosemary Trump (hereinafter "Trump"), at all times relevant to the facts giving rise to this dispute, served as President of Local 585.

5. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1332 in that complete diversity of citizenship exists between all Plaintiffs and all Defendants and the amount in controversy exceeds $75,000.00, exclusive of interest and costs.

6. Venue is proper in this Court pursuant to 28 U.S.C. §1391(a)(1) in that all defendants reside in this judicial district and pursuant to 28 U.S.C. §1391(a)(2) in that a substantial portion of the events or omissions giving rise to this action occurred within this judicial district.

GENERAL BACKGROUND ON BEVERLY AND THE SEIU

7. Beverly is the nation's largest private provider of nursing home care.

8. Beverly and the Service Employees International Union (hereinafter "SEIU") have been embroiled in a long-standing dispute over the SEIU's representation of Beverly employees. The dispute finds its origins in the mid-1980s when the SEIU first targeted Beverly homes for unionization.

9. During the course of its efforts to unionize Beverly employees, the SEIU has filed innumerable unfair labor practice charges against Beverly with the National Labor Relations Board (hereinafter "NLRB"). Included among these were a series of charges dating back to 1986 that led to a decision by the NLRB *In re Beverly California Corp.*, 310 NLRB No. 37 (1993), commonly known as "Beverly I." The Administrative Law Judge rendered his decision in Beverly I on November 9, 1990. The NLRB issued its decision on January 20, 1993. The Second Circuit, in *Torrington Extend-A-Care Employee Assoc. v. National Labor Relations Board,* 17 F.3d 580 (2d Cir. 1994), reversed the NLRB's decision and remanded the case for further proceedings on February 28, 1994.

10. After realizing that traditional union activities would not be effective in its dealings with Beverly, the SEIU, during the 1980s, decided to launch a "corporate campaign" against Beverly. Such campaigns are designed to use external pressure on a company and its top policy-makers through non-traditional union tactics in order to influence the company's strategic business decisions.

11. Among the many tactics used in a corporate campaign are attacks on the management of the company designed to discredit the company. In the case of Beverly, in addition to its efforts to impugn management, the SEIU has falsely portrayed Beverly as anti-worker, anti-consumer, unsafe

and greedy; appealed to government agencies to investigate alleged bad practices; petitioned legislators to bring political pressure to bear upon the company; and used media strategies to encourage repetition of false and defamatory articles.

12. The SEIU's goals in implementing its corporate campaign against Beverly were two-fold. First, the SEIU wanted Beverly to capitulate into recognizing its local affiliates, without representation elections conducted by the NLRB and to deprive Beverly employees of their right to choose freely whether they wish to be represented by the SEIU. Second, the SEIU wanted to bring economic pressure to bear on Beverly using non-traditional means to coerce Beverly into agreeing to terms and conditions of collective bargaining agreements that Beverly would not otherwise have agreed to in the face of traditional labor pressures such as strikes.

BACKGROUND ON BEVERLY AND THE SEIU IN PENNSYLVANIA

13. Beverly subsidiaries own and/or operate forty-two nursing home facilities in Pennsylvania. Of those forty-two nursing homes, twenty have employees that are represented by local affiliates of the Service Employees International Union, either District 1199P, Local 585, and Local 688.

14. The last of the Collective Bargaining Agreements covering Beverly's unionized Pennsylvania nursing homes expired on November 30, 1995. Following the expiration of that agreement, Beverly and the SEIU engaged in collective bargaining, but initially were unable to agree on the terms and conditions of a new Collective Bargaining Agreement. During these negotiations, the SEIU continued to wage its corporate campaign against Beverly in an effort to force Beverly to agree to terms proposed during the negotiations.

15. One of the principal aims of the SEIU during these negotiations was to obtain a master contract that would apply to all unionized Beverly homes in Pennsylvania. Beverly was not amenable to this proposal, preferring instead to have individual agreements that were tailored to suit the specific needs of each facility. Indeed, since early Fall of 1995 each Beverly unionized facility had in place a negotiating team that repeatedly sought facility-specific negotiations. Notwithstanding, the SEIU appointed one Chief Negotiator for all twenty facilities, had a "state-wide" bargaining committee composed of representatives from all twenty facilities, and avowedly sought a "Master Contract" to cover all twenty facilities.

16. On March 15, 1996, the SEIU gave notice to Beverly of its intention to engage in a three-day strike. Although the ostensible basis for the strike was to protest unfair labor practices, the three-day strike was, in fact, simply another component of the SEIU's corporate campaign and was done principally in the hope that it would force Beverly to accede to the SEIU's demands at the bargaining table.

17. Under §8(g) of the National Labor Relations Act, the SEIU was required to give ten days advance notice of its intended strike so that Beverly could make arrangements for temporary employees to ensure that essential health care services to its residents were not adversely affected by the strike.

18. The notice initially received by Beverly indicated that the strike would commence at 7:00 a.m. on Friday, March 29, 1996. Subsequently, at the last minute, on Wednesday, March 27, 1997, Beverly received notice that the commencement of the strike had been postponed until 6:00 a.m. on Monday, April 1, 1996. The sudden change interfered with the arrangements that Beverly had made for temporary employees. In addition, because the second notice arrived only five days before the strike, it failed to provide the required ten-days notice and thus the strike was unlawful. Beverly advised the SEIU that the second notice did not fulfill the requirements of §8(g) and that it would consider any strike held pursuant to the second notice to be unlawful. Despite Beverly's lack of consent to the notice, on April 1, 1996, at 7:00 a. m., fifteen of the twenty unionized facilities were struck.

19. Once the strike commenced, Beverly engaged permanent replacement workers in order to ensure that critical health care services were not interrupted to its residents or their welfare jeopardized during the strike. At the conclusion of the strike, when the strikers offered to return to work, Beverly concluded that its was more appropriate from a business standpoint for the replacement workers to remain in their positions and for the company to recall former workers on an as-needed basis. Between April 1996 and January 1997, Beverly recalled approximately 290 of the strikers to their former positions and another 237 were recalled to different positions.

20. Nevertheless, on July 8, 1996, the NLRB filed a §10(j) injunction action against Beverly, seeking an order directing it to recall all of the strikers to their former positions. On April 4, 1997, the United States District Court for the Western District of Pennsylvania concluded that

Beverly should, in fact, recall the former strikers. That decision is now on appeal to the United States Court of Appeals for the Third Circuit.

21. After extensive negotiations, Beverly and the SEIU were able to reach agreement, in early June 1997, on new Collective Bargaining Agreements at all Beverly nursing homes with employees represented by the SEIU. Beverly, however, continues to remain the target of a corporate campaign by the SEIU.

BACKGROUND ON DOTSON AND THE ETHICS IN GOVERNMENT ACT

22. In 1982, Dotson was nominated by President Ronald W. Reagan to serve as Chairman of the NLRB. On February 18, 1983, the United States Senate confirmed Dotson's nomination, and he assumed his duties immediately thereafter.

23. Prior to his nomination to be Chairman of the NLRB, Dotson had served as Assistant Secretary of Labor for Labor-Management Relations. Before entering government service, Dotson had been Chief Labor Counsel for Wheeling-Pittsburgh Steel Corp., Labor Counsel for Westinghouse Electric Corp., and Labor Counsel for Western Electric Co.

24. As an employee of the federal government, Dotson was subject to the provisions of the Ethics in Government Act, which is codified in part at 18 U.S.C. §§207, 208, and 216. Among others things, the Act imposes restrictions on the scope of former government employees' post-government service employment. In particular, the Act permanently prohibits former government employees from knowingly making appearances before any government representative or agency in matters on which the former employee was personally and substantially involved; prohibits former government employees for a period of two years from knowingly making appearances before any government representative or agency in a matter that was pending under the former employee's official responsibility for the one-year period prior to his departure from government service; restricts senior employees of the executive branch for one year after they leave government service from knowingly making appearances before any government representative or agency in which the former employee seeks official government action; and restricts the conditions under which government employees may negotiate for post-government employment. Violations of the Act are felonies, punishable by up to five years imprisonment for a willful violation and a fine of up to $50,000.00.

25. In their current form, those provisions provide in pertinent part as follows:

§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

> **(a) Restrictions on all officers and employees of the executive branch and certain other agencies.** (1) Permanent restrictions on representation on particular matters. Any person who is an officer or employee . . . of the executive branch of the United States . . . and who, after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —
>
> > (A) in which the United States . . . is a party or has a direct and substantial interest,
> >
> > (B) in which the person participated personally and substantially as such officer or employee, and
> >
> > (C) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title.
>
> (2) Two-year restrictions concerning particular matters under official responsibility. Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with a particular matter —
>
> > (A) in which the United States . . . is a party or has a direct and substantial interest,
> >
> > (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States . . . and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 or this title.

***

(c) One-year restriction on certain senior personnel of the executive branch and independent agencies. (1) Restrictions. In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee . . . of the executive branch of the United States . . . who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person . . . in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee . . . in a judicial or other proceeding . . . in which, to his knowledge, any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest —

Shall be subject to the penalties set forth in section 216 of this title.

§ 216. Penalties and injunctions

(a) The punishment for an offense under section . . . 207, 208 . . . of this title is the following:

(1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.

(2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.

> (b) The Attorney General may bring a civil action . . . against any person who engages in conduct constituting an offense under section . . . 207, 208 . . . of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater.

26. Dotson's tenure as Chairman of the NLRB ended on December 16, 1987.

27. Dotson entered the private practice of law as a partner with Keck, Mahin & Cate in Washington, D.C. on December 17, 1987.

28. In May, 1991, Dotson accepted employment with Beverly as its Vice-President and Deputy General Counsel and subsequently became its Senior Vice-President for Labor and Employment.

29. At all times relevant to the events described hereinafter, Dotson continued in his capacity as Beverly's Senior Vice President for Labor and Employment.

COUNT I — DEFAMATION

30. Plaintiffs incorporate, as if fully rewritten herein, the allegations of Paragraphs I through 29, inclusive.

31. The SEIU persuaded several members of the minority Democratic party in the United States Congress to whom it has given support in the past to convene an informal "town hall" meeting in the Allegheny County Courthouse on May 19, 1997 to hear unsworn statements concerning H.R. 1624, the "Federal Procurement and Assistance Integrity Act," a bill proposed by the ranking minority member of the House Veterans Affairs Committee.

32. The true purpose of this "town hall" meeting was to provide a forum designed solely to attack Beverly and assist the SEIU in their campaign to cause economic harm to Beverly and its nursing homes in Pennsylvania.

33. On May 15, 1997, H.R. 1624 was referred to the House Committee on Government Reform and Oversight, and to the House Committee on Education and the Workforce. None of the members of Congress present at

the May 19 "town hall" meeting are members of either of the Committees to which this bill had been assigned.

34. To date, no Congressional committee or subcommittee hearings have been held on H.R. 1624, and none are scheduled.

35. The May 19, 1997 "town hall" meeting was not an official Congressional hearing, but was simply an informal meeting organized by the SEIU and several members of the minority party in Congress to hear statements from invited speakers on how H.R. 1624 would affect Beverly's existing contracts with the Veteran's Administration and why causing economic harm to Beverly would be a good thing for the SEIU.

36. Defendant Trump was one of the persons invited to appear and speak during the "town hall" meeting, and she did so both in her individual capacity and as President of SEIU Local 585.

37. During the "town hall" meeting, Trump delivered a statement and responded to questions from the Members of Congress in attendance.

38. Among the questions to and answers by Trump was the following:

> CONGRESSMAN KLINK: Thank you. To Ms. Trump and Ms. Ford, just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at the other Beverly locations across the country? What transpired in Pennsylvania to make the situation here much worse?
>
> MS. TRUMP: Well, this is one of the most unionized, heavily unionized Beverly states, if not the most unionized Beverly state. They operate approximately 42 facilities in Pennsylvania, 20 of which are organized and we have had a history of bargaining that went very well. *But quite frankly when President Clinton was elected and a new Chairman of the National Labor Relations was appointed, the former Chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government* and besides which, I could really — really this is conjecture on my part, but I can only assume that because they went out and recruited the former general counsel for the National Right to Work Committee. They decided that you're the largest chain of Beverly facilities, if we're able to break unionism in the Beverly chain, then, of course, it will have a ripple

affect in the entire industry and the whole industry will operate nonunion.

That's my opinion, of course. I can't obviously produce any evidence to that effect, but the reality is that since the former Chairman of the National Labor Relations Board, Don Dotson, and the former general counsel of the National Right to Work Committee was hired by Beverly in the last three-year period, it's been very clear that this is not about business, this is about ideology and the ideology is, frankly, is to pretend that the National Labor Relations Act passed in 1935 never happened. (emphasis added)

39. The ''gist'' or ''sting'' of Trump's statements concerning Dotson include that Dotson may have negotiated for employment with Beverly during his tenure as Chairman of the NLRB in criminal violation of federal ethics laws described above and that Dotson, following his departure from government employment, engaged in criminal and other activities prohibited by federal ethics and labor laws by representing Beverly in matters that had been pending before the NLRB during his Chairmanship in violation of federal ethics laws described above.

40. The ''gist'' or ''sting'' of Trump's statements concerning Beverly include that Beverly aided and abetted a criminal conspiracy by helping Dotson to engage in criminal and other activities in violation of federal ethics and labor laws described above.

41. Trump's statements concerning the circumstances of Dotson's employment with Beverly and Beverly's employment of Dotson are false and defamatory and/or imply false and defamatory statements of fact concerning Dotson and Beverly.

42. Trump's statements accuse Dotson and Beverly of criminal and other conduct in violation of the Ethics in Government Act, and other federal labor laws, as described above and, as such, are defamatory *per se* under applicable Pennsylvania law.

43. Trump's statements were made without privilege, be it statutory, common law, or constitutional in nature.

44. Trump's defamatory statements concerning Dotson are not protected expressions of opinion because they are based on the existence of objectively provable facts, and even if Trump's statements were considered ''opinion,'' they are nevertheless actionable because they imply the existence of undisclosed defamatory facts.

45. Trump's statements were made to the members of Congress and to the members of the general public assembled at the "town hall" meeting, as well as to a cable television audience, and were understood by those recipients to be of and concerning Dotson and Beverly. Furthermore, the recipients understood the defamatory meaning of the Trump's statements.

46. Trump acted with constitutional malice in making the defamatory statements at issue, in that she made such statements either with actual knowledge of the falsity of those statements or with reckless disregard as to the truth of those statements.

47. Local 585 is liable for Trump's statements as they were made by her both individually and within the scope of her duties as President of SEIU Local 585, which authorized, approved and ratified Trump's statements. Trump's statements were consistent with the SEIU's corporate campaign tactic of attacking management in an attempt to discredit the Company.

48. On August 15, 1997, Plaintiffs Beverly and Dotson filed suit in this Court against Trump, in her individual capacity, alleging, *inter alia,* that her statements made at the "town hall" meeting were false and defamatory and had caused damage to Plaintiffs.

49. The current collective bargaining agreement between Beverly and Local 585 contains an alternative dispute resolution provision which requires each party to give the other thirty (30) days' notice prior to instituting legal action. Thus, on September 5, 1997, Plaintiff Beverly sent a letter to SEIU Local 585, notifying Local 585 of the lawsuit against Ms. Trump and informing the Union of Beverly's belief that Ms. Trump's statements were authorized and approved by Local 585. Beverly informed the Union of its intent to sue Local 585 for Ms. Trump's "town hall" meeting statements unless the Union publicly repudiated those statements. A copy of said letter is attached hereto as Exhibit "A". To date, the Union has neither resolved the dispute through alternative dispute resolution nor has SEIU Local 585 repudiated Ms. Trump's statements.

50. As a proximate result of Trump's statements, made by Trump both individually and with the authorization, approval and/or ratification of Local 585, Dotson and Beverly have sustained damage to their reputations and good names in an amount to be established at the trial of this matter.

51. Trump's defamatory statements about Dotson and Beverly, made by Trump both individually and with the authorization, approval and/or ratification of Local 585, were made willfully, maliciously, in bad faith,

with ill will, wantonly and recklessly, and with actual malice. Therefore, Dotson and Beverly demand punitive damages from Local 585.

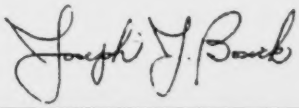
WHEREFORE, Plaintiffs Donald L. Dotson and Beverly Enterprises, Inc. respectfully request that this Honorable Court grant them the following relief:

I. Judgment in favor of Plaintiff Donald L. Dotson and against Defendant SEIU Local 585 in a sum in excess of $75,000.00, plus legal interest and costs;

II. Judgment in favor of Plaintiff Beverly Enterprises, Inc. and against Defendant SEIU Local 585 in a sum in excess of $75,000.00, plus legal interest and costs; and

III. For such other and further legal and equitable relief as this Court may deem just and proper under the premises.

Respectfully submitted,



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Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs hereby demand a trial by jury.

Joseph J. Bosick

Joseph J. Bosick

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BEVERLY ENTERPRISES, INC., and DONALD L. DOTSON, Plaintiffs, v. ROSEMARY TRUMP, Defendant.	Civil No. 97 1490

AFFIDAVIT OF ROSEMARY TRUMP

I, Rosemary Trump, being duly sworn, state that I have personal knowledge of the following:

1. I am the Defendant in this action.

2. I am the President of Service Employee International Union, Local 585.

3. In this capacity, I participated in collective bargaining with Beverly Enterprises, Inc. concerning the terms and conditions of employment of employees employed in 20 Beverly nursing homes in Pennsylvania.

4. In June of 1997, the parties reached agreements concerning the 20 homes. As part of the settlement of the individual contracts, the parties entered into an alternate dispute resolution agreement. A true and correct copy of that agreement is attached hereto as Exhibit 1.

5. After the filing of this action, my counsel sent the letter attached hereto as Exhibit 2 to Plaintiffs' counsel.

6. After finding of the action, Beverly's counsel sent the letter attached hereto as Exhibit 3 to Local 585.

7. A true and correct copy of Beverly's response to Exhibit 2 is attached hereto as Exhibit 4.

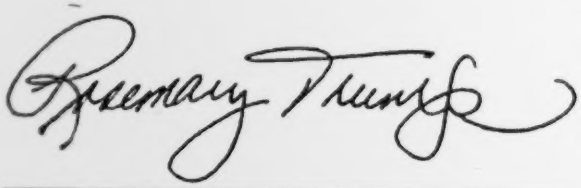
8. A true and correct copy of Local 585's response to Exhibit 3 is attached hereto as Exhibits 5 and 6.

9. A true and correct copy of Beverly's response to Exhibits 5 and 6 is attached hereto as Exhibit 8.

10. The congressional field hearing on H.R. 1624 that is at issue in Count II of the Complaint in this action was taped by Pennsylvania Cable Network. The Service Employees International Union purchased a copy of the tape which is attached hereto as Exhibit 9. The tape accurately records the hearing.

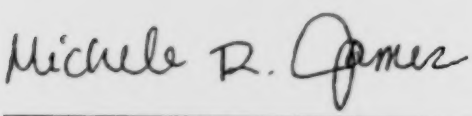
11. The tape or portions of it was shown on cable television.

The foregoing is true and correct to the best of my knowledge.



ROSEMARY TRUMP

SWORN to and SUBSCRIBED
before me this 15th day
of October, 1997.



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Supreme Court, U.S.
FILED
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Case No. 99-733

IN THE SUPREME COURT
OF THE UNITED STATES

BEVERLY ENTERPRISES, INC. and DONALD L. DOTSON,
Petitioners,

v.

ROSEMARY TRUMP and SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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2658

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STATEMENT OF THE CASE

Petitioners are Beverly Enterprises, Inc., the nation's largest for-profit operator of nursing homes, and Donald L. Dotson, Beverly's Senior Vice-President for Labor and Employment. A29, ¶6; A35, ¶28. Petitioners filed two defamation actions under Pennsylvania law in the federal District Court for the Western District of Pennsylvania under its diversity jurisdiction, one against Respondent Rosemary Trump and another against Respondent Service Employees Union, Local 585. A28-53. Trump is the President of Local 585. A.28, ¶3. Local 585 represents employees at a number of Beverly's homes in Pennsylvania and the parties were involved in negotiations for new contracts governing these homes during the relevant time period. A30, ¶¶12-13.

The Complaints attempted to state claims of defamation under Pennsylvania law arising out of statements allegedly made by Local President Trump on two occasions. The first was a political rally in a park in Pittsburgh where Trump allegedly approached Dotson in the crowd and

> 31. ...ascertained that he was with Beverly;

ascertained his identity; inquired as to whether Dotson knew who she was; and became visibly upset and irate when Dotson said he did not know who she was.

32. Trump told Dotson that he should have known who she was and then identified herself as Rosemary Trump, President of SEIU Local 585. Unprovoked, she then began to berate Dotson in a loud and angry voice, easily overhead by other people nearby. Trump accused Dotson of being a "criminal" and said that "you people at Beverly are all criminals."

33. Without raising his voice, Dotson attempted to respond to Trump's loud accusations. Trump cut him off and angrily accused him of "devoting (his) entire career to busting unions."

34. Trump was resistant to reasoned discourse by Dotson in response to her accusations. She would not shut up, and she would not go away. Finally, she shouted at Dotson:

> "I know your kind. You're just part of that World War II generation that danced on the graves of Jews."

A35-36.

The second occasion was a town hall meeting convened by several members of Congress in the Allegheny County Courthouse to hear statements concerning H.R. 1624, the "Federal

Procurement and Assistance Integrity Act." A37, ¶43. During the course of Trump's statement at the meeting, Congressman Ron Klink asked her a question about Beverly and she allegedly responded, in part,

> *when President Clinton was elected and a new Chairman of the National Labor Relations was appointed, the former Chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government.*

A37-38, ¶48 (emphasis in original).

The District Court consolidated the cases and then granted Defendants' motion to dismiss solely on state law grounds. The Court dismissed the claim based on the statements in the park on the grounds that it failed to allege statements that could reasonably be understood to be defamatory because they were "mere hyperbole and insulting rhetoric...incapable of defamatory meaning as a matter of law." A15-16. The District Court dismissed the claim based on the statements at the town hall meeting on the grounds that they were entitled to an absolute

legislative witness privilege. A16-19.

The Court of Appeals unanimously affirmed the dismissal solely on state law grounds. The Court agreed with the District Court that the alleged statements in the park concerning union busting and being a criminal could not reasonably have been understood to be statements of fact and were thus nonactionable as a matter of law. A5-6. The Court upheld the dismissal of that portion of the claim based on the alleged statement concerning dancing on the graves of the Jews on the grounds that under Pennsylvania law a plaintiff must allege either defamation per se or special damages to state a claim arising out of an oral statement, i.e. a claim of slander, and Plaintiffs failed to allege either. A6-7. The Court upheld the dismissal of the claim based on the statement at the town hall meeting on the grounds that it could not reasonably have been understood to be defamatory. A9-12.

Petitioners seek review in this Court only of the rulings on their claims based on the alleged statements in the park concerning union busting and dancing on the graves of the Jews and the

alleged statement at the town hall meeting.

ARGUMENT

A writ of certiorari should not be granted in this case for three reasons. First, the courts below decided this case solely under Pennsylvania law. Plaintiffs attempted to state claims under state law. Both court below dismissed the claims based on state law. Neither court relied on or even mention any federal law defense. No federal question was addressed in the decisions below. Second, the federal questions that Petitioners attempt to raise before this Court were not raised below. Third, the federal questions that Petitioners attempt to raise before this Court have been clearly and consistently answered.

I. The Courts Below Dismissed This Case Solely Under Pennsylvania Law

The two defamation cases at issue were filed in the District Court for the Western District of Pennsylvania solely under its diversity jurisdiction. *See* A28-29, ¶4; A42, ¶5. Only state law defamation was pleaded in the complaints. *See* 35-39, ¶¶29-58; A48-52, ¶¶30-51. The District Court dismissed the consolidated

actions solely under Pennsylvania defamation law. *See* A14-19. The Court of Appeals affirmed based solely on state law. *See* A5-12.

A. The Court of Appeals upheld the dismissal of the claims based on the alleged statements concerning union busting and the solicitation of employment based on PA. CONS. STAT. §8343(a) (West 1999), which makes "the defamatory character of the communication" an element of a defamation claim. *See* A5. Following Pennsylvania law, the Court held that "'it is the court's duty to determine if the publication is capable of the defamatory meaning ascribed to it by the party bringing suit.'" A5 (quoting *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996)). Following the Pennsylvania Supreme Court's allocation of this function to the Court, the Court of Appeals held that under Pennsylvania law neither of the alleged statements was capable of conveying a defamatory meaning.

The Court of Appeals upheld the dismissal of the claim based on the alleged statement concerning union busting on the grounds that any reasonable listener would have understood it to

be mere"rhetorical hyperbole or a vigorous epithet" rather than a statement of fact. A5-6. While Petitioner states that the Court relied on *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), *see* Petition at 4, the Court actually followed the standards for dividing epithets from statements of fact established by "Courts in Pennsylvania," quoting *Kryeski v. Schott Glass Techn., Inc.*, 626 A.2d 595 (Pa.Super. 1993). *See* A6. The Court merely cited *Greenbelt* as an additional authority. *See* A6.

B. The Court of Appeals upheld the dismissal of the claim based on the alleged statement concerning the solicitation of employment on the grounds that no reasonable listener could have understood it to be an accusation that Dotson violated the Ethics in Government Act. *See* A11-12. Petitioners argued that the statement implied that Dotson sought employment with Beverly while he was employed by the National Labor Relations Board and that he offered to represent Beverly before the agency in cases he had handled or supervised while at the agency. The Court held that the alleged statement "is incapable of conveying either of the

defamatory meanings plaintiffs advance." A12.[1]

C. The Court of Appeals also upheld the dismissal of the claim based on the alleged statement about dancing on the graves of the Jews on purely state law grounds. Again, relying on Pennsylvania's codification of the elements of a slander claim, the Court concluded that the elements of a slander claim in Pennsylvania include special damages unless slander per se is alleged. A6. The Court then concluded that the Complaint failed to allege either slander per se or special damages. A7.[2]

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[1] Petitioners incorrectly state that the Court of Appeals upheld the dismissal of this claim on the grounds that the Complaint did not allege either slander per se or special damages. Petition 6-7. Petitioners also fault the Court of Appeals for not considering other potentially defamatory meanings of the alleged statement. Petitioner at 19 n. 5. But as the Court of Appeals clearly and correctly held, Petitioners advanced only two potentially defamatory meanings and the Court held that the alleged statement could not reasonably have been understood to convey either.

[2] Petitioners incorrectly state that the Court of Appeals held that the statement was capable of a defamatory meaning. Petitioner at 5, 26. The Court of

(continued...)

The District Court dismissed the state law slander claims solely on state law grounds. The Court of Appeals upheld the dismissal of the state law slander claims on purely state law grounds. The decisions below do not raise a federal question.

II. Petitioners Did Not Raise The Federal Questions They Attempt To Raise Before This Court Below

Petitioners attempt to raise three federal questions before this Court. However, none of the questions was raised below.

A. The first question Petitioners attempt to raise is whether the First Amendment somehow requires courts to analyze whether an allegedly defamatory statement contains statements of fact capable of being proven false before concluding that the statement is nonactionable rhetorical hyperbole. In the District Court and the Court of Appeals, however, while Petitioners argued that the alleged statements could reasonably have been understood to be statements of fact, they did not argue that the First Amendment somehow imposed a burden on the District Court or the Court of

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[2] (...continued)
Appeals did not reach this question because it held that the Complaint failed to allege either defamation per se or special damages. A6-7.

Appeals to conduct a particular form of analysis before concluding otherwise. Thus the District Court and the Court of Appeals did not address the First Amendment in any way before concluding that the statement about union busting was nonactionable rhetorical hyperbole under Pennsylvania law.

B. The second question Petitioners attempt to raise is whether the First Amendment somehow prohibits courts from construing the elements of a defamation claim under state law to include elements not required by the First Amendment when the claim is made by a public figure. In the District Court and the Court of Appeals, however, while Petitioners argued that the elements of a slander claim under Pennsylvania law do not include special damages, they did not argue that the First Amendment somehow prevented the District Court or the Court of Appeals from so reading Pennsylvania law. Neither the District Court nor the Court of Appeals found that Dotson was a public figure. Neither the District Court nor the Court of Appeals even mention public figure doctrine. In fact, the District Court and the Court of Appeals did not address the First Amendment in any way. The

Court of Appeals simply concluded that the slander claim based on the alleged statement about dancing on the graves of the Jews was insufficient under Pennsylvania law because it did not allege either defamation per se or special damages.

C. The final question Petitioners attempt to raise is whether this Court's decision in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), somehow prohibits states from including elements in all claims of defamation that were not mandated in *Linn* for claims arising out of labor disputes. In the District Court and the Court of Appeals, however, while Petitioners argued that the elements of a slander claim under Pennsylvania law did not include special damages, they did not argue that this Court's decision in *Linn* somehow prevented the Court from so reading Pennsylvania law. In fact, Petitioner's argued in the Court of Appeals that "Appellee Trump's Statements About Dotson At The Dole/Kemp Rally Did Not Arise In The Context Of A Labor Dispute." Brief at 45. Thus the Court of Appeals did not address *Linn* in any way before concluding that the slander claim based on the alleged statement about dancing on the graves of the Jews was defective under

Pennsylvania law because it did not allege defamation per se or special damages. In fact, neither court below even cited *Linn* in its opinion.

The federal questions Petitioners attempt to raise before this Court were not raised before either the District Court or the Court of Appeals.

III. The Questions Petitioners Attempt To Raise Have Been Clearly And Consistently Answered

The questions Petitioners attempt to raise before this Court have been clearly and consistently answered. This is because, in each instance, Petitioners attempt to turn the protections of federal law on their head, arguing that the First Amendment and the National Labor Relations Act protect not "freedom of speech," U.S. Const., amend. I, or the "free discussion envisioned by the [National Labor Relations] Act," *Linn*, 383 U.S. at 65, but rather reputation. This Court has recognized that the "legitimate state interest underlying the law of libel" must be balanced against the freedom of speech protected by the First Amendment and it has recognized that "a State's concern with redressing malicious libel

is 'so deeply rooted in local feeling and responsibility' that it fits within the exception [to federal labor law preemption]." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Linn*, 383 U.S. at 62. But this Court has never suggested in any manner that either the United State Constitution or the National Labor Relations Act prevent a state or a court construing state law from limiting the protection of reputation available under state law. Rather, this Court has held that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood." *Gertz*, 418 U.S. at 345-46. While up to now, the First Amendment and the National Labor Relations Act have been construed to limit the circumstances in which damages can be recovered based on speech alone, Petitioners argue that the First Amendment and National Labor Relations Act limit the pleading requirements a state can uniformly impose on all plaintiffs alleging defamation. The questions raised by Petitioners do not merit Supreme Court review.

A. Applying only Pennsylvania law, the Court of Appeals held that the alleged statement that Dotson had devoted his entire career

to busting unions was not an actionable statement of fact. The Court concluded, "the reasonable listener would recognize this statement as merely a vituperative outburst which, although undoubtedly offensive,...is not actionable in defamation." A6.[3]

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[3] Contrary to Petitioner's suggestion, the Court of Appeals considered all the allegations in the Complaint concerning both the content and context of the alleged statement before holding it was nonactionable. The Court noted that the Complaint alleged that Trump identified herself as the president of a labor union, was "visibly upset," spoke in a "loud and angry voice," and uttered not one but a stream of insults. A4. These facts amply support the Court's conclusion. The Restatement (Second) of Torts (1977) is directly on point:

> A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. Thus when, in the course of an altercation, the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not reasonably to be understood as asserting the

(continued ..)

The Court of Appeals did not misapply "constitutional defamation doctrine" as argued by Petitioners because it did not apply any constitutional doctrine. While Petitioners present an extensive analysis of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and its progeny, the Court of Appeals did not even cite *Milkovich*.

This Court's constitutional defamation doctrine limits state law defamation claims in order to protect speech under the First Amendment. Thus, in *Milkovich*, the lower court held that "the article in question was constitutionally protected opinion." *Id.*, at 10. This Court granted review to "consider the important questions raised by the Ohio courts' recognition of a constitutionally required 'opinion' exception to the application of defamation laws." *Id.* In contrast, the Court of Appeals' decision in this case held the speech nonactionable solely under state law.

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[3] (...continued)

fact that the plaintiff is of illegitimate birth but only to be abusing him to his face.

Id., §566, at 176. Pennsylvania courts have a "general tendency to follow the Restatement." *Agriss v. Roadway Exp., Inc.*, 483 A.2d 456, 473, 334 Pa.Super. 295 (1984).

The decision neither threatens First Amendment protections nor misapplies them. The First Amendment is simply beside the point in this case.

Moreover, even if the Court of Appeals had relied on constitutional doctrine, its decision is wholly consistent with *Milkovich*. While this Court made clear in *Milkovich* that "expressions of 'opinion' may often imply an assertion of objective fact," it also made clear that the "[*Greenbelt Cooperative Publishing Assn., Inc. v.] Bresler*[, 398 U.S. 6 (1970),] -- *Letter Carriers [v. Austin*, 418 U.S. 264 (1974),] -- [*Hustler Magazine v.] Falwell*[, 484 U.S. 46 (1988),] line of cases [still] provide protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual.... This provides assurance that public debate will not suffer for lack of 'imaginative expression' or 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Id.*, at 22. The "dispositive question," according to this Court in *Milkovich*, is "whether a reasonable fact finder could conclude that the statements...imply an assertion [of fact]." *Id.*, at 21. This is

precisely the question both the District Court and the Court of Appeals posed and answered in the negative.

B. Again, applying only Pennsylvania law, the Court of Appeals held that the claim based on the alleged statement concerning dancing on the graves of the Jews was insufficient because it alleged neither defamation per se nor special damages. The Court of Appeals' decision does not "conflict with the Pennsylvania Supreme Court on an important question of federal law regarding the protections available to defendants under the First Amendment in public figure defamation actions" as argued by Petitioners because the Court of Appeals did not rely on the protections available to defendants in defamation actions brought by public figures. Petitioners simply misstate the holding below when they state that "the Third Circuit's decision imposes an additional burden on public figure libel plaintiffs in Pennsylvania." Petitioner at 17. In fact, the Third Circuit's decision merely held that this "additional burden" exists for *all* plaintiffs alleging slander under Pennsylvania law. The Court of Appeals did not hold that Dotson was a public figure and did not even cite any of

the public figure jurisprudence. Rather, the Court held that under Pennsylvania law all plaintiffs alleging slander must plead either defamation per se or special damages regardless of the identity of the plaintiff.[4] The holding was in no way limited to public figures or based on Dotson being a public figure. Petitioners' argument that the First Amendment somehow prevents the states from including elements in all claims of slander that are not required to avoid violating the First Amendment in a public figure case is without foundation.[5]

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[4] The Court of Appeals based it decision on the Pennsylvania law of slander not the Pennsylvania Constitution. Thus Petitioner's argument that the Court's decision conflicts with the Pennsylvania Supreme Court's decision holding that the State Constitution provides no more protection for defendants in defamation actions than the federal Constitution is inapposite.

[5] Petitioners argue that the Court of Appeals' decision conflicts with Pennsylvania law on the grounds that the statement at the town hall meeting was libel and not slander because the town hall meeting was televised. However, this argument is beside the point because the Court of Appeals relied on the requirement of pleading either defamation per se or special damages only in

(continued...)

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[5] (...continued)
upholding the dismissal of the claim based on the alleged statement concerning dancing on the graves of the Jews. The Court upheld the dismissal of the claim based on the alleged statement at the town hall meeting on the grounds that the statement could not reasonably have been understood to be defamatory. A12.

Moreover, Petitioners did not make this argument below. The parties addressed this question in post-argument letters invited by the Court during argument. Defendants argued that while Pennsylvania had eliminated the per se/per quod distinction in libel cases, the State had maintained the distinction in slander cases. In response, Plaintiffs argued only that the "complaint...properly alleges slander per se" and that "the slander per se -- per quod distinction...has no continuing validity in modern defamation law." January 8, 1999 letter to P. Douglas Sisk, Clerk at 2, 4. Moreover, Plaintiffs argued that the Pennsylvania court's rationale in libel cases "applies with equal force to modern slander actions." *Id.*, at 5. Plaintiffs never argued that this was a libel case and did not even cite the three cases cited in their Petition to this Court to support their argument that televised broadcasts are libel not slander.

Finally, Petitioners are simply wrong. The most recent Pennsylvania case they cite, *Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 532 A.2d 346 (1987), does not address the issue. There is only dicta in the second case they cite, *Schonek v. WJCA, Inc.*, 436 Pa. 6, 258 A.2d 504, 506 (1969). And the (continued...)

C. Similarly, the Court of Appeals' decision is not "contrary to Supreme Court doctrine on labor dispute defamation" as argued by Petitioners because the Court of Appeals did not rely on the federal law protections available to speakers in labor disputes. Again, Petitioners simply misstate the holding below when they state that "the Third Circuit held that, under Pennsylvania law, in addition to meeting the *Linn* requirements, a plaintiff defamed

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[5] (...continued)
final case they cite, *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 191 A.2d 662 (1963), states, again in dicta, that "the common law distinction between [slander and libel is] not...applicable to the law of radio." *Id.*, 191 A.2d at 666. *Purcell* cites *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939), which distinguishes a radio broadcast from a print publication at considerable length. *Id.*, 8 A.2d at 310-11. Thus there is no Pennsylvania decision on point. Moreover, the three cited cases were all brought against broadcasters and the Restatement suggests that "the broadcaster" should be placed "upon the same footing as the publisher of a newspaper." Section 568A at 182. Defendants in this case were, however, not the broadcaster of the meeting. No Pennsylvania court has held that the fact that an oral statement in a public forum is captured on film by another party renders the speaker subject to a libel rather than a slander action.

during the course of a labor dispute must also plead and prove an additional element." Petition at 27. In fact, the Third Circuit's decision merely held that this "additional element" must be pleaded and proved by *all* plaintiff alleging slander under Pennsylvania law. The Court did not find that the action arose out of a labor dispute as defined in *Linn*. The Court did not even cite *Linn* in its opinion. The Court of Appeals did not hold that a plaintiff alleging defamation in an action arising out of a labor dispute must plead either defamation per se or special damages because the action arose out of a labor dispute. Such a holding would arguable have been preempted by federal law as an effort on the part of the State to regulate labor relations. Rather, the Court of Appeals held that plaintiffs alleging slander in all actions under Pennsylvania law must allege either defamation per se or special damages.

Petitioners' argument that this general requirement of pleading under Pennsylvania law somehow conflicts with *Linn* is baseless. *Linn* simply requires that plaintiffs in defamation actions arising out of labor disputes plead and prove actual malice in order

to avoid federal preemption. Federal labor law is wholly unconcerned with the reputational interests of defamation plaintiffs. If a state wishes to impose an additional element of pleading and proof on such plaintiffs regardless of whether the alleged defamation arose out of a labor dispute, federal labor law is not implicated. *Linn* in no way suggests that the state law of defamation must in every other respect be uniform. The law of defamation varies considerably state by state and this Court has never suggested that this variation is inconsistent with federal labor law. In fact, the defamation per se/defamation per quod distinction is a venerable one existing in many states and no court has ever suggested it is inconsistent with federal labor law. *Linn* balances the federal interest in unrestricted speech in labor disputes with the states' interest in protecting the reputations of their citizens. *Linn* cannot be read to require states to protect the reputational interests of their citizens in a uniform manner. *Linn* "dealt...solely with the degree to which state remedies have been pre-empted by the [National Labor Relations] Act." *Id.*, at 67. In no respect did this Court mandate state remedies as argued by

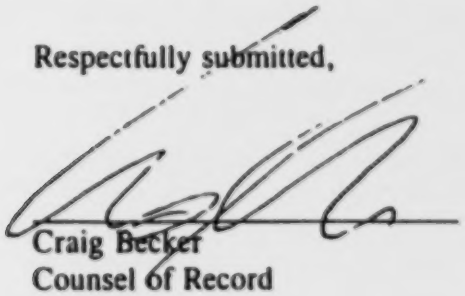
Petitioners.

The questions Petitioners attempt to raise in this Court do not merit review.

CONCLUSION

For the above-stated reasons, this Court should deny the petition.

Respectfully submitted,



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CASE NO. 99-733

IN THE SUPREME COURT OF THE UNITED STATES

BEVERLY ENTERPRISES, INC. and DONALD L. DOTSON,
Petitioners,

-

v.

ROSEMARY TRUMP and SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585
Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THIS CASE RAISES IMPORTANT FEDERAL QUESTIONS WHICH CANNOT BE DECIDED EXCLUSIVELY ON STATE COMMON LAW GROUNDS

A. THE THIRD CIRCUIT'S DECISION ON RHETORICAL HYPERBOLE WAS BASED ON FEDERAL CONSTITUTIONAL DOCTRINE

While defamation is a state law cause of action, there is no question that major aspects of defamation law have been constitutionalized by this Court. As a result, *every* state law defamation claim raises First Amendment issues which, if decided in conflict with Supreme Court precedent, are properly submitted to this Court for review by writ of certiorari.

The law of rhetorical hyperbole is a constitutionally-based privilege recognized by this Court in *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970) and its progeny. It was not developed by Pennsylvania state courts.

The District Court found Respondent Trump's accusation that Petitioner Dotson "had devoted his entire career to busting unions" to be non-actionable rhetorical hyperbole uttered in the context of a labor dispute. The District Court concluded that the statement would not have been taken literally by any person (A16), and cited *Old Dominion Branch No. 496 National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) to support its conclusion. (A15).

The Court of Appeals affirmed the District Court's holding, also citing *Greenbelt*, as well as two Pennsylvania decisions and the Restatement (Second) of Torts. Respondents assert that the Court of Appeals actually based its ruling on the Pennsylvania decisions, and "merely cited *Greenbelt* as an additional authority." (Brief in Opp., at 7). One of the Pennsylvania decisions cited by the Third Circuit,

however, *Redding v. Carlton*, 296 A.2d 880, 881 (Pa. Super. 1972), applies the rhetorical hyperbole analysis only after discussing the constitutionalization of the law of defamation, citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Rosenblatt v. Baer*, 383 U.S. 75 (1966), and specifically analyzing *Greenbelt* in a lengthy footnote. *Redding*, 296 A.2d 881-82, n. 2.

Review by this Court is required because the Third Circuit applied a constitutional privilege to Respondent's statements, without first performing the requisite constitutional analysis. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) holds that the rhetorical hyperbole privilege cannot be invoked without analyzing the meaning of the words used and whether those words contain a factual connotation capable of being proven true or false. By merely labeling Respondent's union-busting allegation as non-actionable rhetorical hyperbole, without first analyzing meaning, the Third Circuit has decided an important federal question in a way that clearly conflicts with this Court's precedent.

Respondents admit that the appeals court did not engage in a *Milkovich* analysis, but boldly assert that no such analysis was necessary because the First Amendment is "beside the point" in this case. (Brief in Opp., at 16). The First Amendment, however, is never beside the point in a defamation case, and the appellate court's failure to engage in a constitutional analysis of meaning is precisely why certiorari should be granted.

The Third Circuit is not alone in failing to properly analyze a statement's meaning before affording constitutional protection. In addition to the numerous examples cited by Petitioners to the Court in their Petition for Writ of Certiorari, the 11th Circuit also has gotten it wrong. Just three days before the Petition in this case was filed, the 11th Circuit decided *Dunn v. Airline Pilots Association*, 193 F.3d

1185, 1999 U.S. App. LEXIS 26823 (11th Cir. 1999). In *Dunn*, the plaintiff airline pilots had been included by their union, the Airline Pilots Association ("ALPA"), on a "scabs" list published by the ALPA during a sympathy strike of Eastern Airlines. The pilots sued for defamation, claiming they were not "scabs" because there had been no properly authorized strike, but only an unauthorized work stoppage. Analyzing the truth or falsity issue only from the viewpoint of the reasonable reader, the majority rejected the plaintiffs' argument that a determination of truth in this context must begin with an analysis of whether the union was legally on strike. *Dunn*, 1999 U.S. App. LEXIS at *19-21.

In a persuasive dissent, Judge Tjoflat suggests that the reasonable reader test was inadequate to determine the truth or falsity of the "scab" allegation, since "scab" is a factual allegation with specific definitions and consequences. The dissent argued that it was just as important to analyze the *intended* as well as the *received* meaning:

> In this case, we must assume that ALPA intended, through the publication of the scab list, to convey that its strike was legal. A contrary assumption would mean that ALPA published a list of all the pilots who worked during a strike it illegally ordered. Although it is theoretically possible that ALPA wanted to convey such a message, it is highly unlikely, for such a message would only harm the union.

Id. at *54-55. Clearly, even individual judges on the same federal appellate panel have different understandings of how meaning is to be derived under this Court's precedent.

B. LABOR DISPUTE DEFAMATION IS ALSO GOVERNED BY SUPREME COURT DOCTRINE

Congress, by passing the National Labor Relations Act, intended to establish a uniform national labor policy. In *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966), this Court determined, as a matter of federal law, that a party defamed during the course of a labor dispute must prove that the statements were published with actual malice, and that they caused the plaintiff actual harm.

Petitioners have pled both actual harm and actual malice. Still, the Third Circuit found Petitioners' pleading deficient with regard to two of the statements at issue because of Petitioners' failure to meet Pennsylvania's requirement to plead special damages in slander *per quod* cases. Thus, even though the federal standards of *Linn* have been met, Petitioners find themselves without remedy for admitted defamation arising in the context of a labor dispute.

Respondents have not articulated *any* overriding state interest which would justify Pennsylvania's slander *per quod* exception to the rule set forth in *Linn*. Hence, the imposition of a state common law special damages requirement in a labor dispute defamation case, where actual malice and actual harm are present, is clearly in conflict with the relevant precedent of this Court.

Respondents argue that courts can avoid federal labor law analysis merely by ignoring relevant federal precedent. (Brief in Opp., at 20). Congress and this Court, however, have determined that labor matters are to be treated differently, and that a uniform set of rules are to apply nationally. Respondents argue that Pennsylvania law overrides federal labor law in this case because its special damages requirement applies to all *per quod* defamation plaintiffs,

and not just labor dispute defamation plaintiffs. (Brief in Opp., at 21). In essence, Respondents' argument is that federal labor law, like the First Amendment, is beside the point.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH PENNSYLVANIA SUPREME COURT DECISIONS ON IMPORTANT FEDERAL QUESTIONS

Respondents' primary contention is that this case has been decided exclusively on state law grounds and does not involve federal law or constitutional doctrine. Even on state law grounds, however, the Third Circuit got it wrong. Its decision affirming the District Court's dismissal of Petitioners' Complaint conflicts with Pennsylvania's court of last resort on an important federal question involving defamation

A. PENNSYLVANIA'S CONSTITUTIONAL PROTECTION OF REPUTATION CANNOT BE IGNORED

The Third Circuit's decision imposes a special damages requirement on defamation plaintiffs in Pennsylvania that is not required under relevant precedent of this Court. By increasing a defamation plaintiff's burden of pleading and proof and, consequently, enhancing the protections available to defamation defendants, the Third Circuit is in direct conflict with the Pennsylvania constitution, which protects reputation as an inalienable right. The Pennsylvania Supreme Court has interpreted its constitution to mean that Pennsylvania courts may not expand the protections afforded speech by the First Amendment beyond what is provided by this Court. *Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988). The Third Circuit, by requiring *per quod* defamation plaintiffs to prove more than this Court's decisions require to recover damages, has expanded

the protections afforded speech beyond those found in the First Amendment, in clear violation of Pennsylvania law.[1]

Respondents do not deny that the Third Circuit's decision expands First Amendment protections for speech beyond what has been afforded by this Court, and do not dispute that the Third Circuit's decision violates the Pennsylvania constitution. Instead, Respondents argue that none of that matters because "the Court of Appeals based its decision on the Pennsylvania law of slander not the Pennsylvania Constitution." (Brief in Opp., p. 18, n. 4).

Respondents' position is that the Court of Appeals is free to ignore the Pennsylvania constitution, just as it is free to ignore the First Amendment and federal labor law. Respondents fail to explain, however, how a state's constitutional protection for reputation can be deemed irrelevant to Pennsylvania slander law. In fact, the two cannot be separated, and no defamation case in Pennsylvania can be decided without due regard for Pennsylvania's constitutional protection for reputation.

B. TRUMP'S TELEVISED STATEMENTS ARE LIBEL, NOT SLANDER, UNDER PENNSYLVANIA LAW

The parties agree that Pennsylvania has eliminated the *per se/per quod* distinction in libel cases, even if it has not expressly

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[1] Whether the courts below relied on public figure doctrine is not important because the question presented by Petitioners to this Court is not limited to public figure defamation cases. Petitioner Dotson is a public figure, and publication with actual malice was alleged. But even if Petitioners were private figures, actual malice would be the standard for defamation arising in a labor dispute. Thus, the broader question presented is whether a court of appeals may provide greater protection than this Court's actual malice standard when doing so conflicts with the state's highest court.

done so in slander cases. (Brief in Opp., p. 19, n. 5). With regard to Trump's statement at the Town Hall meeting, therefore, Petitioners have argued that 1) the rules of libel should apply, since Trump's Town hall meeting was televised; and, 2) there is no special damages requirement for libel plaintiffs in Pennsylvania.[2]

Respondents contend that broadcast statements are libelous when the defendant is the broadcast company, and slanderous when the defendant is the speaker. (Brief in Opp., p. 20, n. 5). Respondents cite no authority for this illogical distinction.

Historically, libel and slander were treated differently because of the more long-lasting harmful effect of the written word. The Pennsylvania Supreme Court has recognized that this distinction is not valid in the age of electronic media. "As . . . for slander and libel, *the common law distinctions between these two terms not being applicable to the law of radio.*" *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167 (1963) (emphasis added).[3]

It is the wide dissemination that results from a television and radio broadcast that requires it to be treated as libel and not slander. Rodney A. Smolla, *The Law of Defamation* §1.04[4], at 1-11 (1998).

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[2]Contrary to Respondents' contention (Brief in Opp., p. 19, n. 5), the lack of special damages was a basis for the Court of Appeals' decision regarding Trump's Town Hall statements. "Moreover, to the extent the statement is susceptible of another defamatory interpretation that does not constitute an accusation of criminal wrongdoing, such interpretation would not constitute slander *per se* and, as a result [Petitioners'] Complaint would be insufficient for failure to allege special damages." (A12).

[3]Although Respondents claim this statement from *Purcell* was merely dicta (Brief in Opp., p. 20, n. 5), the case was later cited by the Pennsylvania Supreme Court in *Schonek v. WJAC, Inc.*, 436 Pa. 78, 82, 258 A.2d 504, 506 (1969) in support of the proposition that a defamation case based upon a radio broadcast statement should have been for libel rather than slander.

Clearly, it is the potential impact of the published statement, and not the identity or role of the speaker, that turns a traditionally slanderous statement into libel.

III. ALL ARGUMENTS RAISED IN THE PETITION FOR WRIT OF CERTIORARI WERE RAISED BELOW

A. PETITIONERS ARGUED BELOW THAT *MILKOVICH* REQUIRES AN ANALYSIS OF MEANING

Respondents assert that Petitioners did not argue below "that the First Amendment somehow imposed a burden on the District Court or the Court of Appeals to conduct a particular form of analysis before concluding" that a statement is nonactionable rhetorical hyperbole. (Brief in Opp., p. 9). Respondents are wrong. Approximately four pages of Petitioners' merit brief in the Third Circuit is devoted to an analysis of rhetorical hyperbole and meaning under *Milkovich*. (A95-98).[4] Petitioners' argument in support of certiorari merely discusses in greater depth how meaning is to be analyzed under *Milkovich* and *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

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[4]The *Milkovich* analysis and argument was presented to the Third Circuit only in the context of the Dole-Kemp rally statements because the District Court had applied legislative immunity to the Town Hall meeting statements, and did not reach any conclusions about the meaning of those statements. In opposing Respondents' Motion to Dismiss in the District Court, however, Petitioners argued that Trump's statements at the Town Hall meeting were capable of a defamatory meaning as well

B. PETITIONERS ARGUED BELOW THAT PENNSYLVANIA LAW LIMITS THE PROTECTIONS AVAILABLE FOR SPEECH

Petitioners do not argue for the first time that Pennsylvania law limits what protections the federal courts may afford Pennsylvania defamation defendants. In fact, Petitioners focused on Pennsylvania's unique protection for reputation in the first sentence of the "Summary of Argument" section of their merit brief in the Third Circuit. (A74). Later in that brief, Petitioners cite to both the Pennsylvania constitution and *Sprague v. Walter* to support their argument that Pennsylvania courts may go no further than this Court in protecting First Amendment principles. (A104). Finally, as acknowledged by Respondents in their opposition brief, the issue of the continuing viability of the *per se/per quod* distinctions was addressed in post-argument letters submitted to the Third Circuit. (Brief in Opp., p. 19, n. 5).[5]

C. PETITIONERS ARGUED BELOW THAT *LINN* GOVERNED THIS ACTION TO THE EXTENT IT CONCERNED LABOR DISPUTE DEFAMATION

Respondents' assertion that Petitioners have not previously argued that the standards established by *Linn v. United Plant Guard Workers* govern this dispute is spurious. *Linn* was cited by Petitioners numerous times in their merit brief to the Third Circuit. In fact, Petitioners identified the decision as "[t]he seminal case on defamation in a labor dispute context, ..." (A104). Petitioners also cited

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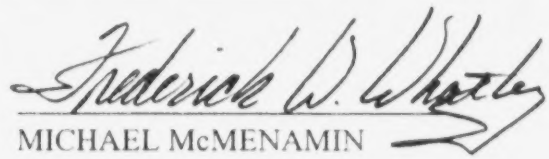
[5] Respondents imply that these post-argument letters should be ignored. This position is disingenuous since it was Respondents' request at oral argument to further brief the *per se/per quod* distinction, after their oral argument time had expired, that led to the filing of the post-argument letters — not an unsolicited "invitation" from the court.

Austin to support their argument that Trump's statements were capable of a defamatory meaning. (A97). While Petitioners argued in the courts below that Trump's statements at the Dole/Kemp rally did not arise in the context of a labor dispute (Brief in Opp., p. 11), Petitioners also argued in the alternative that, if the court considered Trump's statements to have arisen in the context of a labor dispute, then the standards set forth in *Linn* must be applied and, under *Linn*, Petitioners had stated a viable claim for relief.

IV. CONCLUSION

For these reasons, and for the reasons set forth in their Petition for Writ of Certiorari, Petitioners respectfully request that the Writ of Certiorari be granted.

Respectfully submitted,



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CASE NO. 99-733

IN THE SUPREME COURT OF THE UNITED STATES

BEVERLY ENTERPRISES, INC. and DONALD L. DOTSON,
Petitioners,

v.

ROSEMARY TRUMP and SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585
Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

APPENDIX (CONTINUED) TO PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CASE NO. 98-3222

On Appeal From The United States District Court, Western District of Pennsylvania's Dismissal of Appellants' Original Cause of Action in Case No. 97-1490

BEVERLY ENTERPRISES; DONALD L. DOTSON,
Appellants

v.

ROSEMARY TRUMP; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 585
Appellees

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I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction over these consolidated cases was proper in the District Court pursuant to 28 U.S.C. §1332 in that complete diversity of citizenship existed between all Plaintiffs and all Defendants and the amount in controversy exceeds $75,000, exclusive of interest and costs.

Appellate jurisdiction in this Court is proper as an appeal of right pursuant to 28 U.S.C. §1291, in that Appellants Dotson and Beverly timely filed a Notice of Appeal on April 3, 1998 from a final order of the District Court for the Western District of Pennsylvania disposing of all claims with respect to all parties.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in concluding that the "Town Hall" meeting was an official legislative proceeding entitling Appellee Rosemary Trump to absolute immunity for her statements concerning Dotson and Beverly where:

a. The "Town Hall" meeting was scheduled and its agenda planned by the SEIU long before H.R. 1624 had been introduced in Congress, which happened only a few days before the "Town Hall" meeting was held, and formal legislative hearings on the bill were never scheduled or held;

b. The hearing was neither sanctioned nor sponsored by any committee or subcommittee of Congress; attendance by speakers was voluntary and all statements at the meeting were unsworn; and none of the members of Congress in attendance at the meeting were members of the committees or subcommittees to which any relevant pending legislation had been assigned;

c. The District Court failed to conduct even a threshold inquiry into whether, given the SEIU's active role, the "Town Hall" meeting was within the sphere of legitimate legislative activities which are eligible for legislative immunity;

d. Trump conceded in papers filed with the District Court that the "Town Hall" meeting was not a legislative proceeding;

e. Trump's statements at the "Town Hall" meeting were not related to any legislative purpose but instead constituted an *ad hominem* attack on Appellant Dotson's ethics and professionalism, and an equivalent assault on Appellant Beverly's business reputation;

f. The District Court ignored the well-pleaded factual allegations of Dotson and Beverly's Complaint, and failed to draw all reasonable inferences in the light most favorable to Dotson and Beverly, all as required when reviewing a motion to dismiss pursuant to Rule 12(b)(6); and,

g. Pennsylvania courts have never afforded absolute immunity to voluntary, unsworn statements made informally to legislators.

2. Whether the District Court erred in considering materials outside the pleadings to support its holding that the informal "Town Hall" meeting was a true legislative proceeding in which Trump was entitled to absolute legislative immunity for her statements concerning Dotson and Beverly when:

a. The parties had both requested that Trump's Rule 12(b)(6) Motion be converted to one for summary judgment under Rule 56; and,

b. Dotson and Beverly were not given the opportunity to discover and present Rule 56 evidence to rebut the extrinsic materials presented by Trump and relied upon by the Court in contravention of Rule 12(b) of the Federal Rules of Civil Procedure.

3. Whether the District Court erred in concluding that Trump's statements at the Dole/Kemp rally were not capable of a defamatory meaning as a matter of law, where:

a. The statements alleged actual facts about Appellant Dotson and could have been taken seriously by those who heard the statements;

b. The statements were a personal attack by Trump on a company official at a presidential campaign rally which had nothing to do with the terms and conditions of employment; and,

c. The Complaint alleges that Trump's statements at the Dole/Kemp rally were made with actual malice, and relevant Supreme Court precedent makes clear that the National Labor Relations Act does not protect the malicious lie.

III. STATEMENT OF THE CASE

This lawsuit was commenced with the filing of Dotson and Beverly's Complaint on or about August 15, 1997. The Complaint is in two Counts, both sounding in defamation. (Joint Appendix, hereinafter "J.A.," p. 6). The first Count alleges that Appellee Rosemary Trump confronted Appellant Donald Dotson at a political rally in Pittsburgh on August 18, 1996 and made a number of false and defamatory statements about Dotson, including accusations of anti-Semitism, which were heard by the crowd assembled there. Trump, at all times relevant to this matter, was President of the Service Employees International Union, Local 585 ("SEIU"). Count II alleges that Trump again made false and defamatory statements at a "Town Hall" meeting, organized by the SEIU and attended by some local members of Congress friendly to the SEIU, and held at the Allegheny County Courthouse on May 19, 1997, accusing Appellants Dotson and Beverly Enterprises, Inc. ("Beverly") of engaging in criminal violation of federal ethics laws both during and immediately after Dotson's tenure as Chairman of the National Labor Relations Board.

In lieu of an Answer, Appellee Trump filed a Motion to Dismiss on October 15, 1997. (J.A., p. 29). Trump raised numerous substantive and privilege defenses in her Motion. She submitted materials outside of the pleadings to support her arguments and asked the Court to convert her Motion to Dismiss into one for summary judgment pursuant to Rule 56.

On October 30, 1997, Dotson and Beverly filed a Motion to Exclude Extrinsic Materials Submitted in Support of Defendant's Motion to Dismiss. (J.A., p. 105). Dotson and Beverly requested that the materials outside the pleadings submitted by Appellee Trump be excluded. Alternatively, Dotson and Beverly argued that, if the Court chose to consider such materials, the Court must convert Trump's Motion to Dismiss into one for summary judgment, and give Dotson and Beverly an opportunity for discovery. Beverly and Dotson also filed a Brief in Opposition to the Motion to Dismiss on November 7, 1997 (J.A., p. 120). They did not, however, simply rest on their pleadings but also submitted their own extrinsic evidence supporting the Complaint allegations that the "Town

Hall'' meeting was orchestrated and planned by the SEIU long before any relevant legislation was introduced into Congress.

On December 29, 1997, Dotson and Beverly filed a separate Complaint against SEIU Local 585, also based upon Trump's defamatory statements at the ''Town Hall'' meeting.[1] (J.A., p. 306). That Complaint alleged that Local 585 was liable for Appellee Trump's statements at the ''Town Hall'' meeting as they were made by Trump both individually and within the scope of her duties as President of SEIU Local 585. By Order dated February 9, 1998, the District Court consolidated the case against SEIU Local 585 with the case against Trump. (J.A., p. 326).

After full briefing by all parties, the District Court, by Memorandum Opinion and Order dated March 5, 1998, granted Trump's Motion to Dismiss (The District Court's Memorandum Opinion is attached to this Brief at Tab A). The District Court held, as a matter of law, that Trump's statements at the political rally were not capable of a defamatory meaning. The District Court also concluded, based upon the extrinsic materials submitted by Trump, that the ''Town Hall'' meeting was a legislative proceeding and, therefore, Trump was entitled to absolute immunity from liability for any statements she made at that proceeding.

Even though the District Court considered Trump's extrinsic materials in reaching these conclusions (and did not consider the extrinsic materials submitted by Dotson and Beverly), it refused a request by all parties to convert Trump's Motion to Dismiss into one for summary judgment. It instead held that the Complaint failed to state a claim upon which relief could be granted. No ruling was ever made on Dotson and Beverly's Motion to Exclude Extrinsic Materials.

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[1] *Beverly Enterprises, Inc. and Donald L. Dotson v. Service Employees International Union, Local 585* (Case No. 97-2356, W.D. Pa.) was consolidated with the Trump case, and the case number for the Trump case includes the consolidated case. (J.A., p. 326).

IV. STATEMENT OF FACTS

A. TRUMP MAKES DEFAMATORY STATEMENTS AT THE DOLE/KEMP RALLY AT POINT STATE PARK FALSELY ACCUSING DOTSON OF CRIMINAL CONDUCT AND ANTI-SEMITISM

On Sunday, August 18, 1996, a large crowd gathered for a political rally in Point State Park in downtown Pittsburgh in support of then-presidential candidate Bob Dole and his running mate, Jack Kemp. (Complaint, J.A., p. 15, ¶ 30). Appellant Dotson attended the rally, where he was approached by the President of SEIU, Local 585, Rosemary Trump. Trump ascertained that Dotson was with Beverly, ascertained Dotson's identity and inquired as to whether Dotson knew who she was. Trump became visibly upset and irate when Dotson said that he did not know who she was. (Complaint, J.A., p. 15, ¶31).

Trump told Dotson that he should have known who she was and then identified herself as the president of SEIU Local 585. Unprovoked, Trump then began to berate Dotson in a loud and angry voice, easily overheard by other people in the crowd. Trump accused Dotson of being a "criminal" and said that, "You people at Beverly are all criminals." Dotson attempted to respond to Trump's loud accusations, but was cut off by Trump, who accused Dotson of "devoting [his] entire career to busting unions." She then shouted at Dotson, "I know your kind. You're just part of that World War II generation that danced on the graves of Jews." (Complaint, J.A., p. 15, ¶¶32-34).

Dotson and Beverly's Complaint alleged that Trump's statements concerning Dotson were false and defamatory and imply false and defamatory facts concerning both Dotson and Beverly. The "gist" or "sting" of Trump's defamation against Dotson is that he is anti-Semitic, that he is a criminal and that he has devoted his entire professional career (part of which was spent as Assistant Secretary of the U.S. Department of Labor for Labor-Management Relations and Chairman of the National Labor Relations Board) to illegal and criminal conduct the purpose of which is to "bust" unions. (Complaint, J.A., pp. 15-16, ¶¶35-36). Dotson and Beverly further alleged that Trump made these statements with actual malice; that they were not privileged; and that, as a result of Trump's malicious and defamatory statements, Dotson has suffered damage to his reputation and good name. (Complaint, J.A., p. 16, ¶¶37-41).

B. TRUMP MAKES DEFAMATORY STATEMENTS AT THE "TOWN HALL" MEETING FALSELY ACCUSING DOTSON AND BEVERLY OF A CRIMINAL CONSPIRACY

The SEIU orchestrated and persuaded several members of the minority Democratic party of the U.S. Congress to whom it had given financial contributions and other support in the past to attend a "Town Hall" meeting in the Allegheny County Courthouse to hear unsworn statements concerning H.R. 1624, the Federal Procurement and Assistance Integrity Act, a bill proposed by the ranking minority member of the House Veterans' Affairs Committee. Extensive preparation for and invitations to the meeting had been issued long before the bill was introduced. In fact, the bill was introduced in Congress only four days prior to the "Town Hall" meeting. (Exhibit A-1 to Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss, J.A., p. 179). The Complaint alleged that the true purpose of this "Town Hall" meeting was to provide a forum designed solely to attack Beverly and assist the SEIU in its corporate campaign[2] to cause economic harm to Beverly and its nursing homes in Pennsylvania. (Complaint, J.A., pp. 16-17, ¶¶43-44).

The "Town Hall" meeting was not an official Congressional hearing, but was merely given the surface trappings of one to mislead the public. It was no more than a political event organized by the SEIU and attended by several members of the minority party in Congress to further the interests of the SEIU against Beverly by publicly attacking Beverly's business reputation. Its real purpose was to create a forum to "bash" Beverly with impunity under the guise of hearing statements from speakers selected by the SEIU on H.R. 1624 and its effect on Beverly's existing contracts with the Veterans Administration. (Complaint, J.A., p. 17, ¶45).

Appellee Trump was one of the speakers during the "Town Hall" meeting. She delivered a statement and then responded to questions from the Congressional members in attendance. Among the questions and answers given by Trump was the following:

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[2]The term *corporate campaign* "encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public." *Food Lion v. United Food & Commercial Workers Union*, 103 F.3d 1007, 1014, fn. 9 (D.C. Cir. 1997).

> CONGRESSMAN KLINK: Thank you. To Ms. Trump and Ms. Ford, just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at other Beverly locations across the country? What transpired in Pennsylvania to make the situation here much worse?

Trump ignored the question and, much as she did at the Dole/Kemp rally, proceeded to launch an out-of-the-blue, ad hominem attack on Dotson:

> MS. TRUMP: Well, this is one of the most unionized, heavily unionized Beverly states, if not the most unionized Beverly state. They operate approximately 42 facilities in Pennsylvania, twenty of which are organized and we have had a history of bargaining that went very well. *But quite frankly when President Clinton was elected and a new chairman of the National Labor Relations was appointed, the former chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government* and besides which, I could really — really this is conjecture on my part, but I can only assume that because they went out and recruited the former General Counsel for the National Right to Work Committee. They decided that you're the largest chain of Beverly facilities, if we're able to break unionism in the Beverly chain, then, of course, it will have a ripple effect in the entire industry and the whole industry will operate non-union.

(Complaint, J.A., pp. 17-18, ¶¶47-48). (emphasis added).

As the Complaint alleges, the "gist" or "sting" of Trump's defamatory statements at the "Town Hall" meeting is that Appellant Dotson negotiated for employment with Beverly while he was Chairman of the NLRB, in criminal violation of federal ethics laws, and that Dotson, following his departure from government employment, engaged in criminal activities prohibited by federal ethics laws, and violated the canon of ethics governing attorney conduct, by representing Beverly in matters that had been pending before the NLRB during his chairmanship. The "gist" or "sting" of Trump's statements concerning Appellant Beverly is that Beverly itself engaged in, and/or aided and abetted, a criminal conspiracy

by helping Dotson to engage in criminal activities in violation of federal ethics laws. (Complaint, J.A., p. 18, ¶¶49-50).[3]

The truth of the matter is that neither Dotson nor Beverly engaged in any criminal activity as alleged by Trump. (Complaint, J.A., pp. 15-16, 18, ¶¶35, 36, 51). Specifically, neither Dotson nor Beverly committed any action in violation of the Ethics in Government Act. Trump alleged that after President Clinton's election in 1992, Dotson decided to leave the NLRB and that Dotson and Beverly criminally conspired to have Dotson work for Beverly immediately after his term as Chairman of the National Labor Relations Board on NLRB cases that were pending while Dotson was Chairman. Actually, Dotson entered private law practice *after his term as Chairman ended in 1987 — before President Bush was elected, let alone President Clinton*. He continued in private practice until 1992 when he accepted a position with Beverly. Dotson has never represented Beverly in any matter before the NLRB that was pending while he was Chairman, and he had no contact with Beverly at all, never mind employment or possible employment, until long after the post-employment federal restrictions had expired.

As alleged in the Complaint, these statements by Trump at the "Town Hall" meeting are false and defamatory and accuse both Dotson and Beverly of criminal conduct, making them defamatory *per se* under Pennsylvania law. Dotson and Beverly's Complaint further alleged that the statements were made with actual malice, were not privileged and were understood by the recipients of the statements to be of and concerning Dotson and Beverly. Dotson and Beverly also alleged that Beverly and Dotson have sustained damage to their reputations and good names as a result of Trump's statements. (Complaint, J.A., pp. 18-19, ¶¶52-57).

C. THE DISTRICT COURT GRANTS TRUMP'S MOTION TO DISMISS BY RELYING UPON EXTRINSIC EVIDENCE

No discovery has occurred in the case.[4] Instead, Appellee Trump filed a Motion to Dismiss for Failure to State a Claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (J.A., p. 44). Trump

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[3]Dotson and Beverly's Complaint sets out in great detail the federal ethics laws which are invoked by Trump's allegations. (Complaint, J.A. pp. 12-14, ¶¶23-24).

[4]Dotson and Beverly served written discovery upon the SEIU which, instead of responding, filed a Motion to Stay Discovery. This Motion was also never ruled upon by the District Court.

claimed that her statements at the Dole/Kemp rally were not capable of a defamatory meaning, but were merely vigorous epithets uttered in the heat of a labor dispute.

With regard to her statements at the "Town Hall" meeting, Trump claimed that she was entitled to absolute immunity since those statements were made at an official legislative proceeding. In support of this argument, Trump submitted materials outside the pleadings for the District Court to consider, including an affidavit from a legislative aide asserting that the purpose of the "Town Hall" meeting was to consider legislation recently introduced in Congress which would allow the federal government to debar contractors with a history of labor law violations. Trump requested that her Motion be converted to a motion for summary judgment, and that Dotson and Beverly be given notice and an opportunity to discover and present Civil Rule 56 evidence in rebuttal to the extrinsic materials submitted by Trump in support of her Motion. (Memorandum in Opposition to Motion to Exclude Extrinsic Materials, J.A., pp. 284-285).

Dotson and Beverly responded to Trump's Motion to Dismiss in two ways. *First*, Dotson and Beverly filed a Motion to Exclude Extrinsic Evidence which asked the Court not to consider the extrinsic materials submitted by Trump, but to instead determine, pursuant to universally applied Rule 12(b)(6) standards of review, whether Dotson and Beverly's Complaint was legally sufficient. (J.A., p. 120). In the alternative, Dotson and Beverly's Motion requested that the District Court convert Trump's Motion into a motion for summary judgment under Rule 56, and give Dotson and Beverly notice of the conversion and an opportunity to engage in discovery on the issue of legislative immunity.

Second, Dotson and Beverly filed a Brief in Opposition to the Motion to Dismiss. (J.A., p. 120). As exhibits to their Brief in Opposition, Dotson and Beverly submitted verified copies of:

1. A Bill Tracking report for H.R. 1624 showing the three House committees to which it had been referred;

2. 1997 hearing schedules for those committees showing that no hearings or field hearings had been held on H.R. 1624; and,

3. Rule XI of the Rules of the House of Representatives for the 105th Congress which clearly provides that no House committee may take testimony or receive evidence unless at least two (2) members of the Committee are present.

(Exhibits A-1, 2 & 3 to Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss, J.A., pp. 179-236). These materials demonstrated conclusively that no members of the three relevant House committees to which H.R. 1624 has been assigned were even present at the "Town Hall" meeting and that, six months after introduction of the bill, no action had been taken, nor any hearings scheduled, by any of the committees or subcommittees to which the bill had been assigned. (Exhibit A-2 to Brief in Opposition, J.A., pp. 186-206).

The District Court never ruled upon Dotson and Beverly's Motion to Exclude Extrinsic Evidence. Nor did the District Court convert Trump's Motion to Dismiss into one for summary judgment as requested by the parties. Instead, the District Court considered materials outside the pleadings submitted by Trump, declined to consider the extrinsic evidence submitted by Dotson and Beverly, and concluded that Dotson and Beverly's Complaint failed to state a viable claim for relief. The District Court held that Count I of Dotson and Beverly's Complaint should be dismissed because the statements made by Trump at the Dole/Kemp rally accusing Dotson of criminal conduct and anti-Semitism "were mere hyperbole and insulting rhetoric that are unfortunately commonplace in labor disputes" and are never capable of a defamatory meaning. (Memorandum Opinion, pp. 3-5). Count II of Dotson and Beverly's Complaint was dismissed based upon the Court's holding that the "Town Hall" meeting was a true legislative proceeding and that, therefore, Trump was entitled to absolute immunity for any statements she made concerning Dotson and Beverly at the meeting. (Memorandum Opinion, pp. 6-11).

V. STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously, and the only related case, *Beverly Entr. Inc. v. Bronfenbrenner*, Third Circuit Case No. 98-3369, was recently dismissed voluntarily.

VI. STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

This is an appeal from the District Court's Order granting Trump's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6). Therefore, this Court conducts a plenary review over the District Court's Order dismissing Dotson and Beverly's Complaint under Fed. R. Civ. P. 12(b)(6). The

standard of review in this matter was summarized by this Court in *Alexander v. Whitman*, 114 F.3d 1392, 1397-98 (3rd Cir. 1997):

> We exercise plenary review over a district court's order dismissing a complaint under Fed.R.Civ.P. 12(b)(6). *Moore v. Tartler*, 986 F.2d 682, 685 (3rd Cir. 1993). We must determine if plaintiff may be entitled to relief under any reasonable reading of the pleadings, *Holder v. City of Allentown*, 987 F.2d 188, 193 (3rd Cir. 1993), assuming the truth of all factual allegations in the complaint. *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1367 (3rd Cir. 1992). A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984). (footnote omitted).

Id.

Accordingly, this Court acts *de novo* to determine if it is possible for Dotson and Beverly to be entitled to relief while assuming all factual allegations in the Complaint to be true.[5] Even if the District Court had treated Appellee Trump's Motion as a motion for summary judgment, this Court's *de novo* standard of review for an appeal of a granting of summary judgment remains the same. *Alexander v. Whitman, supra*, at 1398, fn. 7.

VII. SUMMARY OF ARGUMENT

The decision of the District Court in this case undermines the ability of individual citizens to protect the reputational interests guaranteed them by the Constitution of the Commonwealth of Pennsylvania. According to the District Court, statements made by voluntary, unsubpoenaed and unsworn "witnesses" at political events are entitled to absolute immunity for even the most vicious falsehoods. As long as legislators are present and the meeting has some pseudo-characteristics of an information-gathering or

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[5]Despite considering evidence outside of the pleadings provided by Defendants, the District Court continued to treat Defendant's Motion as a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (Memorandum Opinion, pp. 3, 14). When previously reviewing an appeal from an earlier Judge Lancaster decision that is similar procedurally to what he did in this case, this Court ignored the extrinsic evidence considered by Judge Lancaster and treated the matter solely as a Rule 12(b)(6) motion. *Independent Enterprises v. Pittsburgh Water*, 103 F.3d 1165 (3rd Cir. 1997).

fact-finding activity, it is of no moment that the defamatory statements bear no relation to the purpose of the meeting. Further, according to the District Court's view, citizens who are falsely accused of anti-Semitism, criminal conduct, racism and bigotry in the Commonwealth of Pennsylvania have no redress because some (but not all) prior decisions issued by courts in different and earlier times have found that labeling someone a criminal, a racist or an anti-Semite is incapable of a defamatory meaning when uttered in the course of a labor dispute.

The most troubling aspect of the District Court's pronouncements is that they come in a case where no discovery has been conducted and no factual record is present to support the Court's conclusions. Thus, without considering any evidence regarding the underlying motivations of the participants and organizers of the "Town Hall" meeting, the District Court somehow found it appropriate to conclude as a matter of law that the meeting was a true "legislative proceeding," and that no statements made by any speaker at the meeting, not even knowing and blatant falsehoods unrelated to the meeting's purpose, could serve as the basis for a defamation action. Likewise, the Court concluded that it needed no record evidence regarding the understanding and the reaction of those in attendance at the Dole/Kemp political rally to conclude as a matter of law that no one would have taken Trump's statements about Appellant Dotson's alleged criminal conduct and anti-Semitism seriously.

Not only has the District Court significantly eroded the protection afforded reputational interests in the Commonwealth of Pennsylvania, but it has done so by trampling on the procedural rights guaranteed injured parties by the Federal Rules of Civil Procedure. Motions to dismiss are to be granted only in those rare circumstances when it is beyond doubt that no set of facts could exist to support the claims made. Well-pleaded factual allegations of an injured party's complaint are to be taken as true, and matters outside the pleadings are *not* to be considered unless the non-movant is at least afforded the opportunity to engage in discovery so as to uncover evidence to refute those matters. Both parties in this case acknowledged those standards and procedures, and requested that the Court abide by them. The District Court, however, deemed them unnecessary, all to Dotson and Beverly's great detriment.

Dotson and Beverly submit that the District Court went too far. It went too far in significantly undermining a defamed party's ability to redress injury to his reputation, especially in a state where a person's interest in his reputation is placed in the same constitutional category as

interests in life, liberty and property. And, it went too far in derogating Dotson and Beverly's rights under the Federal Rules of Civil Procedure to be given an opportunity to develop a factual record in support of their claims. It is now up to this Court to ensure that Dotson and Beverly are afforded the opportunity generally provided in Pennsylvania to seek redress for their reputational injuries.

VIII. LAW AND ARGUMENT

A. TRUMP IS NOT ENTITLED UNDER RELEVANT PENNSYLVANIA PRECEDENT TO ABSOLUTE IMMUNITY FOR HER STATEMENTS AT THE "TOWN HALL" MEETING ACCUSING APPELLANTS DOTSON AND BEVERLY OF CRIMINAL CONDUCT

1. Appellee Trump's Statements Do Not Quality For An Absolute Legislative Privilege Under Pennsylvania Law

Appellee Trump's statements do not qualify for an absolute privilege under Pennsylvania law because her statements fail to meet the requirements of Section 590A of the Restatement 2d of Torts adopted by the Pennsylvania courts. See, *Jennings v. Cronin*, 256 Pa. Super. 398, 389 A.2d 1183 (1978). The Restatement 2nd of Torts provides:

> A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

The District Court's ruling allowing absolute privilege for Trump's statements is erroneous because: 1) Trump's statements were defamatory; 2) the May 19, 1997 "Town Hall" meeting was not a legislative proceeding; 3) Trump's statements were not communications preliminary to a legislative proceeding; and, 4) even assuming that the "Town Hall" meeting was a legislative proceeding or that Trump's statements were actually communications preliminary to the proceeding, Trump's statements had no relation to the claimed purpose of the meeting.

2. Appellee Trump's Statements At The "Town Hall" Meeting That Dotson And Beverly Had Engaged In Criminal Activities Prohibited By Federal Ethics Laws Are Capable Of A Defamatory Meaning

At the "Town Hall" meeting, Appellee Trump accused Appellant Donald Dotson of committing acts that constitute criminal violations of federal ethics laws. Specifically, Trump accused Dotson of negotiating for employment with Appellant Beverly during his tenure as Chairman of the NLRB, and she accused Dotson of representing Beverly in matters that had been pending before the NLRB during his chairmanship. Both of these actions, if true, would be criminal violations of the Ethics in Government Act, which is codified in part at 18 U.S.C. §207, 208 and 216. Violations of the Ethics in Government Act are felonies, punishable by up to five years imprisonment for a willful violation and a fine up to $50,000. The accusations that Beverly and Dotson engaged in these criminal activities were made without privilege and without protection. In addition, Trump's statements were deliberately publicized to the general public, the media and to members of Congress. Also, Trump accused Beverly of engaging in and/or aiding and abetting in a criminal conspiracy by helping Dotson to engage in these criminal activities in violation of the Ethics in Government Act.

Trump's accusations against Dotson and Beverly are defamatory *per se* under applicable Pennsylvania law. *Marcone v. Penthouse*, 754 F.2d 1072 (3rd Cir. 1985), citing *Baird v. Dun & Bradstreet*, 446 Pa. 266, 274, 285 A.2d 166, 171 (1971) ("Statements imputing the commission of an indictable offense are capable of defamatory meaning as a matter of law"). By disposing of Count II in the Complaint on the legislative immunity issue, the District Court declined to reach a conclusion as to the legal sufficiency of the claims in Count II of the Complaint. Had the District Court addressed the legal sufficiency of the claims in Count II of the Complaint, the Court would have held that the Complaint stated legally sufficient claims and, accordingly, the Motion to Dismiss would have been denied.

3. Appellee Trump's Defamatory Statements About Dotson And Beverly Were Not Made At A Legislative Proceeding

The "Town Hall" meeting was not a legislative proceeding. It is undisputed that the informal meeting organized by the SEIU did not have any sworn testimony. Also, as alleged in the Complaint, the meeting was not an official Congressional hearing. After Appellee Trump submitted extrinsic evidence she believed supported her contention that the meeting was a legislative proceeding, Dotson and Beverly submitted extrinsic evidence that this meeting was nothing more than an informal event organized by the SEIU as part of its corporate campaign and only made to

look official. Specifically, Dotson and Beverly submitted convincing evidence that:

1. The meeting was not sanctioned by a single committee or subcommittee of the United States Congress;
2. The meeting was not an official Congressional committee hearing as contemplated by the Rules of the House of Representatives;
3. Congressional schedules did not list the meeting as an official field hearing, committee hearing or subcommittee hearing;
4. The required number of Congressional committee members were not present to constitute an official hearing on the bill alleged to be the focal point of the meeting; and
5. None of the Congressional attendees were even members of the committee or subcommittees involved with the bill.

As this Court aptly stated in *Government of the Virgin Islands v. Lee*, 775 F.2d 514 (3rd Cir. 1985), legislative immunity does not extend to all activities that may have "some nexus to the legislative function" or are only "casually or incidentally" related to legislative affairs. *Id.*, at 520 citing *United States v. Brewster*, 401 U.S. 501, 528 (1972). A review of the facts relating to the purpose and organization of the meeting reveals that the meeting had no actual nexus to a legislative function. The District Court's review of this issue: 1) Did not accept the facts alleged in the Complaint as true; and, 2) accepted extrinsic evidence submitted by Appellee Trump while refusing to accept the extrinsic evidence submitted by Dotson and Beverly. Had the District Court either reviewed the legal sufficiency of the allegations in the Complaint as it was required to do, or reviewed extrinsic evidence submitted by *both* parties as would have occurred in a Rule 56 conversion, the Court would have concluded that the "Town Hall" meeting was not a true legislative proceeding which entitled Appellee Trump to absolute privilege concerning her defamatory statements.

a. The District Court improperly failed to accept the facts alleged in the Complaint as true in determining that the "Town Hall" meeting was a legislative proceeding

The issue of legislative immunity in this case turns not on what was said and who was present at the "Town Hall" meeting, but whether the "Town Hall" meeting was a true legislative proceeding or, instead, merely a partisan meeting orchestrated by the SEIU during an acrimonious labor

dispute as part of its "corporate campaign" against Beverly in Pennsylvania. The Complaint specifically alleged that the "Town Hall" meeting was the brainchild of the SEIU; that it was organized by the SEIU; and that the SEIU persuaded some friendly members of Congress to attend to lend an air of officiality to the proceeding. In essence, the Complaint alleged that the "Town Hall" meeting was a union-organized activity without a legitimate legislative purpose. These well-pleaded factual allegations directly contradict the District Court's holding and required a denial of Trump's Motion to Dismiss.

Complaints are not to be dismissed pursuant to Rule 12(b)(6) unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Complaint is to be viewed in the light most favorable to the plaintiff, with all well-pleaded factual allegations taken as true. *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3rd Cir. 1994). All reasonable inferences are also to be drawn in the plaintiff's favor. *Gordon v. Lancaster Osteopathic Hospital Ass'n.*, 340 Pa. Super. 253, 489 A.2d 1364 (1985); *Parano v. O'Connor*, 433 Pa. Super. 570, 641 A.2d 607 (1994).

The District Court clearly failed to apply these standards in reviewing Trump's Motion to Dismiss. If the allegations in the Complaint regarding the SEIU's role in organizing and supporting the "Town Hall" meeting are true, then at least a factual issue has been raised regarding whether the meeting could possibly be considered a true legislative proceeding, and whether Appellee Trump's false and defamatory statements about Dotson and Beverly are eligible for absolute legislative immunity. The District Court, however, disregarded these key factual allegations, and concluded merely from viewing a videotape of the "Town Hall" meeting that it met the criteria for a legislative proceeding.

The District Court observed that it was not bound to take the allegations in Dotson and Beverly's Complaint that the "Town Hall" meeting was not a legislative proceeding as true because the allegation was a legal conclusion and not a factual allegation. (Memorandum Opinion, p. 10). This observation, however, completely overlooks *the factual allegations upon which the legal conclusion was based*, i.e., that the "Town Hall" meeting was organized by the SEIU as part of its "corporate campaign" against Beverly, the primary purpose of which was to aid the SEIU in swaying public opinion in Pennsylvania against Beverly and to cause it economic harm. Dotson and Beverly are not asserting to this Court

that the District Court should have accepted any legal conclusions set forth in their Complaint as true, but only that the District Court was required to accept their well-pleaded factual allegations as true and to draw all reasonable inferences in Dotson and Beverly's favor, especially in considering a Motion to Dismiss where the Court did not give Dotson and Beverly an opportunity to rebut the extrinsic materials submitted by the movant and relied upon by the Court.

Nothing in the videotape of the "Town Hall" meeting could rebut the allegations in the Complaint that the meeting was no more than an SEIU-orchestrated opportunity to bash Beverly, during an acrimonious labor dispute as part of its "corporate campaign" against Beverly in Pennsylvania, in which the appearance of Congressional representatives was arranged by the SEIU to give it an air of officiality.[6] By drawing all reasonable inferences in Dotson and Beverly's favor, the District Court would have reached the inescapable conclusion that, at the very least, discovery into the means and methods and motives of those organizing the meeting was necessary to establish an appropriate record concerning the issues raised by the Complaint and whether the legislative immunity defense was properly available to Trump in this case at all.

Thus, not only did the District Court ignore the mandatory provisions of Rule 12(b) of the Federal Rules of Civil Procedure by relying upon extrinsic materials submitted by Trump, without giving Dotson and Beverly the opportunity to respond with Rule 56 evidence, but the Court also failed to apply the appropriate analytical standards in reviewing Trump's Motion to Dismiss. This case must be remanded so as to allow Dotson and Beverly the opportunity to exercise the discovery rights afforded them pursuant to the Federal Rules of Civil Procedure.

b. The District Court improperly considered only extrinsic evidence submitted by Trump and refused to consider extrinsic evidence offered by Dotson and Beverly in determining that the "Town Hall" meeting was a legislative proceeding

[6]A key factor in the District Court's decision that Trump's statements at the Dole/Kemp rally were not actionable was the existence of an ongoing labor dispute between the parties. In the Court's analysis of the "Town Hall" statements, however, there is no similar recognition that an ongoing labor dispute existed at the time and that the SEIU's orchestration of an event like the "Town Hall" meeting was a perfect vehicle for Trump and the SEIU to affect public opinion in their favor.

The Complaint filed by Dotson and Beverly in the District Court clearly alleges that the "Town Hall" meeting was not a legitimate legislative proceeding, but instead was a partisan union event organized by the SEIU as part of its "corporate campaign" against Beverly. Rather than allow Dotson and Beverly to develop an adequate factual record in support of these allegations, the District Court merely viewed a videotape of the "Town Hall" meeting and concluded that the meeting had a legitimate legislative purpose. Even the precedent primarily relied upon by the District Court required it to do much more.

Because neither the Pennsylvania Supreme Court nor this Circuit has previously defined "legislative proceeding" for purposes of applying the privilege set forth in Restatement 2d of Torts, Section 590A, the District Court relied by analogy on *Government of the Virgin Islands v. Lee, supra*. At issue in that case, however, was the applicability of the Speech and Debate Clause of the U.S. Constitution to a legislator's fact-finding activities. Based on *Lee*, the District Court concluded that because the "Town Hall" meeting was "conducted by legislators with the objective purpose of aiding the legislators in the drafting, debating, or adopting of proposed legislation," absolute legislative immunity for all witnesses at the meeting was appropriate. (Memorandum Opinion, p. 8).

The District Court's inquiry into whether the "Town Hall" meeting was within the sphere of legitimate legislative activities which are eligible for absolute immunity was clearly inadequate under the standards set forth by this Court in *Lee*:

> Although [a legislator] maintains that his meetings and conversations were official in nature and did involve information-gathering, such assertions cannot preclude a court of competent jurisdiction from determining whether [a legislator's] conversations were, in fact, legislative in nature so as to trigger the immunity.

Government of the Virgin Islands v. Lee, supra at 522. In *Lee*, although this Court held that legislative fact-finding is entitled to legislative immunity as a general matter, it reversed the District Court's finding that the Speech and Debate Clause precluded any inquiry into the purpose or motivation of the legislator's purportedly legislative trip. In reaching that decision, the *Lee* Court cited the Supreme Court's decision in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) where it was held that the investigative activities of Congress are entitled to legislative immunity only "once it is determined that members are acting within the 'legitimate

legislative sphere.' " *Eastland, supra* at 503, quoting *Doe v. McMillan*, 412 U.S. 306, 314 (1973). Quoting another decision of the U.S. Supreme Court, this Court found that "[t]he immunity, however, does not prohibit inquiry into a legislature's activities simply because the activities have 'some nexus to the legislative functions,' or 'casually or incidentally relate [ ] to legislative affairs.' " *Lee, supra*, at 520, citing *United States v. Brewster, supra* at 528.

The District Court's investigation in this case was limited to a review of an unauthenticated videotape of the "Town Hall" meeting submitted by Trump. The Court apparently concluded that, because members of Congress were present, the meeting could be considered a legitimate legislative proceeding with no further factual inquiry required or permitted. The District Court, however, either ignored or discounted all facts alleged and presented by Dotson and Beverly, including the fact that none of the witnesses, including Appellee Trump, were subpoenaed or sworn to give testimony under oath at the "Town Hall" meeting, and that not one of the Congressional representatives present was a member of the committees or subcommittees assigned to review and report on the legislation at issue. The District Court was apparently of the opinion that any facts relating to the purpose and organization of the "Town Hall" meeting were irrelevant to determining whether it was a legitimate legislative proceeding. Certainly, the District Court's inquiry fell far short of what was required under *Lee*.[1]

Clearly, the proposition for which *Lee* stands is that while legislative immunity may protect legislators' fact-finding and investigative activities, there must be a *factual* inquiry into whether the activity in question is properly viewed in law as a legitimate legislative activity or as something else. The burden was on Trump to show more than just "some nexus to legislative functions" or a "casual or incidental relationship to legislative

[1] The District Court's reliance on *Government of the Virgin Islands v. Lee* was misplaced for a number of other reasons as well. Pennsylvania law was not at issue. At issue in that case was a criminal indictment against a Virgin Islands legislator for allegedly misrepresenting a personal trip to Washington, D.C. and New York City as a legislative fact-finding trip and seeking reimbursement from the government on those grounds. Thus, a key distinction between *Lee* and the instant case is that *Lee* analyzed the immunity provided legislators under the Speech and Debate Clause of the United States Constitution, and not under the immunity provided to testimonial witnesses in legislative proceedings under Section 590A of the Restatement 2d of Torts.

affairs." The District Court, however, considered only evidence submitted by Trump, ignored the well-pleaded factual allegations of the Complaint and dismissed out-of-hand any facts submitted by Dotson and Beverly which did not support its conclusion. Thus, even if *Lee* was directly applicable (which it is not), the District Court's failure to allow any meaningful *factual inquiry* falls short of the standard required by the Court's decision in *Lee*.[8]

The "Town Hall" meeting held in Pittsburgh on May 19, 1997 was part of the SEIU's overall plan to bring public pressure to bear on Beverly during the course of its collective bargaining negotiations with the SEIU in Pennsylvania. The local Congressmen who participated were able to parlay their participation into a valuable photo opportunity, as the SEIU's publicity machine guaranteed media coverage, including local cable television broadcasts. Clearly, material issues of fact exist regarding whether or not the "Town Hall" meeting was merely a politically motivated event with, at most, a casual or incidental relationship to legitimate legislative affairs. Dotson and Beverly must be provided the opportunity to rebut the extrinsic materials relied upon by the District Court, and discover Rule 56 evidence in support of their claims.

4. Appellee Trump's Defamatory Statements About Dotson And Beverly Were Not Communications Preliminary To A Legislative Proceeding

Because it found that the "Town Hall" meeting was a legislative proceeding, the District Court did not analyze whether Trump's statements about Dotson and Beverly at the "Town Hall" meeting would qualify as communications preliminary to a legislative proceeding, which are also

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[8]The District Court relied upon two other cases to support its holding that the "Town Hall" meeting was a legislative proceeding, even though the question of what constituted a legislative proceeding was not raised in either. In *Yip v. Pagano*, 606 F. Supp. 1566 (D. N.J. 1985), the allegedly defamatory statements were made during a formal hearing conducted by the House Subcommittee on Crime, eliminating any question that the meeting at issue was a legislative proceeding. This was also true in *Lunderstadt v. Colafella*, 885 F.2d 66 (3rd Cir. 1989), where the plaintiff's claims involved statements and activities of a member of a Select Committee of the Pennsylvania House of Representatives, the Select Committee's counsel and its investigator.

afforded absolute immunity under Restatement 2d of Torts, Section 590A. An analysis of the facts reveals that Trump's statements do not so qualify.[9]

To qualify for immunity as a communication preliminary to a legislative proceeding, the party claiming the privilege has the burden to show that the communication was related "to any actual or seriously contemplated legislative proceedings." *Robertson v. McCloskey*, 666 F. Supp. 241 (D. D.C. 1987). In *McCloskey*, the Court found that witnesses' statements solicited by legislators are not always privileged, especially in the absence of the pendency of legislative proceedings. *Id.* at 247, n. 2. Thus, Trump's burden was to demonstrate that the legislature was "seriously contemplating" legislative proceedings on the issues addressed by her statements to qualify for immunity as a communication preliminary to a legislative proceeding.

Trump did not, and could not, meet that burden. Materials submitted by Dotson and Beverly in opposition to Trump's Motion to Dismiss demonstrated that the legislation in question (H.R. 1624) had been introduced into Congress only four days prior to the "Town Hall" meeting. Even six months later, no action had been taken or hearing held on the bill by any committee or subcommittee to which it had been referred. Thus, it appears that the only activity regarding the bill at the time of the "Town Hall" meeting was its use by the SEIU and some local Congressmen as a springboard for a media event, for, at the time of the "Town Hall" meeting, there were no seriously contemplated legislative proceedings to address H.R. 1624.

5. Appellee Trump's Defamatory Statements About Dotson And Beverly Were Not Related To The Purpose Of The "Town Hall" Meeting

To qualify for absolute immunity under Section 590A of the Restatement 2d of Torts, whether as statements at a legislative proceeding or as communication preliminary to a legislative proceeding, the statements

[9]In its decision, the District Court ignored, without comment, that Trump had abandoned her argument in the District Court that the "Town Hall" meeting was a legislative proceeding. Instead, Trump argued that those statements were entitled to absolute immunity as communications *preliminary* to a legislative proceeding. "Trump *never asserted that the field hearing or town meeting was a formal hearing* . . . thus, the only question is whether the statements were preliminary to a legislative proceeding." (Trump's Reply Memorandum in Support of Motion to Dismiss, J.A. at p. 250). (emphasis added).

at issue must be related to the legitimate legislative purpose of the proceeding or contemplated proceedings. In *Webster v. Sun Co., Inc.*, 731 F.2d 1 (D.C. Cir. 1984), affirmed after remand, 790 F.2d 157 (D.C. Cir. 1986), the Court set forth a 2-part test to establish a relationship between the statements and the legislative purpose of the hearing:

> First, the communicator must show that he would not have made the unsolicited statement but for his intention to inform the legislative body *on a subject properly within its jurisdiction*. Second, the statement must have *some relation to the legitimate legislative business* to which it is addressed.

Id. at 11 (footnote omitted). (emphasis added). Clearly, the statements at issue in this case had no relation to any legitimate legislative business.

The District Court found that the purpose of the "Town Hall" meeting "was to allow local members of Congress to hear testimony regarding the utility of H.R. 1624, . . . and how adoption of H.R. 1624 might affect Beverly's operations." (Memorandum Opinion, pp. 8-9). Trump's statements from the "Town Hall" meeting upon which this lawsuit is based had nothing to do with H.R. 1624. Instead, they consisted of personal attacks against Beverly Vice President Don Dotson and allegations that he had illegally solicited his job with Beverly while still at the NLRB, and that Beverly had hired him immediately from his position as Chairman of the NLRB to take advantage of his knowledge of Beverly cases which had been pending before the NLRB during his tenure as Chairman, all in criminal violation of federal ethics laws.

Statements about the circumstances under which Dotson came to be employed by Beverly have no bearing on whether a law should be passed barring alleged labor law violators from contracting with the federal government. Trump's statements were nothing more than an *ad hominem* attack on Appellant Dotson's ethics and professionalism and an assault on Appellant Beverly's business reputation, both completely unrelated to any proposed legislation. Thus, such statements are clearly outside the scope of the legislative privilege provided for in the Restatement 2d of Torts, Section 590A.

B. PENNSYLVANIA COURTS HAVE NEVER AFFORDED ABSOLUTE IMMUNITY TO VOLUNTARY, UNSWORN STATEMENTS MADE INFORMALLY TO LEGISLATORS

Pennsylvania courts have applied Section 590A of the Restatement 2d of Torts in holding that defamatory statements made under oath by

witnesses subpoenaed to testify before a legislative body are absolutely privileged. But Pennsylvania courts have never been presented with a fact situation like the one in this case involving voluntary, unsworn statements made informally to a group of legislators. Other states have been presented with such fact situations and have chosen not to stretch the limits of Section 590A to such a great extent. At a minimum, the District Court was required to forecast what Pennsylvania courts would do when faced with a novel issue, and to make this forecast based on a variety of factors, including the high value which the Pennsylvania Constitution places on reputation. The District Court did not do so, barely considering any Pennsylvania case law, and the Pennsylvania Constitution not at all.

1. Federal Courts Must Use Their Best Judgment In Interpreting Unsettled Issues Under State Law

Pennsylvania courts have never addressed whether or not absolute legislative immunity should be extended to voluntarily, unsworn defamatory statements made informally to legislators. Under these circumstance, federal courts must use their best judgment to forecast how the Pennsylvania Supreme Court would resolve the issue. *Clark v. Modern Group, Ltd.*, 9 F.3d 321, 326 (3rd Cir. 1993). In doing so, they "must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data . . ." *Travelers Indemnity Company of Illinois v. DiBartolo*, 131 F.3d 343 (3rd Cir. 1997), citing *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 663 (3rd Cir. 1980).

Federal courts are also free to abstain and certify this question to the Pennsylvania Supreme Court. As long as this Court's decision would not needlessly conflict with the internal affairs of the Commonwealth of Pennsylvania, however, invoking the doctrine of abstention is not justified. *Baltimore Bank for Cooperatives v. Farmers Cheese Cooperative*, 583 F.2d 104 (3rd Cir. 1978). There is no reason to believe that a decision in this case would do so. The fact that an issue has not been fully resolved in the state courts is not a basis, in and of itself, to justify delaying the proceedings to certify a question to the state courts. *See, e.g., Travelers Indemnity Company, supra at* 348; *Jim White Agency Company v. Nissan Motor Corporation*, 126 F.3d 832 (6th Cir. 1997). Although this case may present a novel issue of state law that presents some difficulty or involves some technical issues, that is not a sufficient basis for this Court to relinquish diversity jurisdiction. *Baltimore Bank Cooperatives, supra*, at 111, citing *Louisiana Power & Light Company v. Thibodaux*, 360 U.S. 25, 27 (1958). Hence, it is the responsibility of a federal court to review the

novel legal issues presented in this matter by performing a *de novo* review of the issues presented in this case. *Salve Regina College v. Russell*, 499 U.S. 225 (1991).

For the reasons discussed below, Dotson and Beverly submit that Pennsylvania, having equally favored in its Constitution a person's interest in reputation along with interests in life, liberty and property, would afford no more than a qualified privilege to the defamatory statements made by Trump at the "Town Hall" meeting.

2. Pennsylvania Courts Would Afford No More Than A Qualified Privilege To The Defamatory Statements Made By Trump At The "Town Hall" Meeting

Absolute immunity for statements by witnesses in judicial and legislative proceedings is designed to promote honest and candid statements before such bodies. Expanding the application of such immunity beyond the bounds of *formal* legislative and judicial proceedings, however, can lead to blatantly unjust results.

The facts of this case present a perfect illustration of how an absolute immunity from liability can be abused. Without any fear of punishment for lying, and with no real direction or control exercised by the legislators over her "statements," Appellee Trump was free to maliciously slander Dotson and Beverly with knowing falsehoods unrelated to the purpose of the meeting. Dotson and Beverly submit that the circumstances of this case do not require the application of an absolute privilege in order to promote candid and honest statements to legislators. As a matter of public policy, this Court should not extend absolute testimonial immunity to witnesses, like Appellee Trump, who have not been subpoenaed to testify and who are not sworn under oath prior to giving testimony. A conditional or qualified immunity under such circumstances better balances the competing interests.

The District Court concluded that the definition of a legislative proceeding "is broad enough to encompass proceedings — including informal fact-finding, information-gathering, or investigative activities — that are conducted by legislators with the objective purpose of aiding the legislators in the drafting, debating, or adopting of proposed legislation." (Memorandum Opinion, p. 8). The District Court's Opinion necessarily implies that *any statement* by a witness in a legislative proceeding which is made in response to a question by one of the legislators is absolutely privileged, without any need to examine either the substance of the

question or the content of the response or its relationship to legitimate legislative concerns. In this case, the Court engaged in no examination of Trump's response. Instead, without explanation, the Court found that "The statement that plaintiffs find objectionable was *clearly relevant* to the stated purpose of the meeting; indeed, it was made in direct response to a question posed by Representative Klink." (Memorandum Opinion, p. 11) (emphasis added). Such broad application of absolute immunity with no examination of the statement's content or legislative nexus wholly fails to take into account the reputational interests of the person maliciously defamed, let alone a proper Section 590A analysis.

A number of jurisdictions have found that affording absolute immunity to voluntary witnesses, under circumstances where the witness has not been subpoenaed or sworn under oath to tell the truth, goes too far in protecting the speaker at the expense of the injured party's reputation. *See, e.g., Fiore v. Rogero,* 144 So.2d 99, 103 (Fla. Dist. Ct. App. 1962); *Adserv Corp. v. Lincecum,* 385 So.2d 432, 433, 435 (La. Ct. App. 1980); *Wright v. Lathrop,* 149 Mass. 385, 21 N.E. 963, 966 (Mass. 1889); and, *Bell v. Horton,* 107 Ohio App.3d 824, 669 N.E.2d 546, 549 (Ohio Ct. App. 1995). In each of these cases, the Court found that a conditional or qualified privilege would adequately protect the speaker from frivolous lawsuits and at the same time promote the general policy objective of encouraging honest and candid statements before legislative bodies.

The latest court to conclude that a conditional privilege better balances the interests of the defamer with the interests of the defamed is the Wisconsin Supreme Court. In *Vultaggio v. Yasko,* 215 Wis.2d 325, 572 N.W.2d 450 (Wis. Sup. Ct. 1998), the defendant attended a public meeting of the Whitewater, Wisconsin city council and spoke in opposition to a council proposal to add on to the public safety building so as to increase space for the police and fire departments. The defendant favored an alternative proposal which would have involved refurbishing an abandoned school in her neighborhood. During the course of her statement, the defendant criticized the upkeep of several buildings in her neighborhood owned by the plaintiff. The council meeting at which the defendant appeared was broadcast on local television, and there was no evidence that the defendant had been subpoenaed to testify or that she had been sworn under oath prior to addressing the legislative body.

The Wisconsin Supreme Court refused to extend the absolute privilege afforded in Section 590A of the Restatement 2d of Torts to the defendant's statement under such circumstances:

> We decline the invitation to stretch the absolute privilege to such lengths. '[T]he effect of an absolute privilege is to give lavish support to the social interest in obtaining complete disclosures of facts from witnesses, and to ignore completely the predicament of the maligned and remediless individual whose reputation may be harmed.' Ysrella Weinblatt, Case Note, 15 S. Cal. L. Rev. 276, 277 (1942). We are troubled by the fact that in a situation with little guidance, structure or control for the witness's testimony, an absolute privilege eliminates a defamed citizen's right of redress, despite the falsity of the statements, and the malice or ill will of those who make them.

Id. at 336-337.

The Wisconsin Supreme Court considered numerous factors in reaching its decision:

- Rebuttal testimony by the injured party, perhaps at a later meeting, affords little relief, especially when the original testimony has already been broadcast on television.
- The "relate to" requirement of Restatement 2d Section 590A has been construed so liberally so as to provide virtually no real protection to the defamed.
- Unlike judicial proceedings, there is nearly a complete lack of control over the nature and scope of testimony in a legislative proceeding. Not having been sworn under oath, the witness has no fear of punishment for lying. Nor is the witness's testimony controlled by the direction or questioning of the legislative body.

Id. at 338-340.

Consideration of exactly these factors in the instant case also militates against affording Appellee Trump an absolute privilege for her voluntary, unsworn statements at the "Town Hall" meeting. And, like the defendant in *Vultaggio*, Appellee Trump was not subpoenaed to testify at the "Town Hall" meeting nor was she sworn under oath to tell the truth prior to speaking. In addition, her statements were not subject to the

direction and control of the legislators in attendance who allowed her to deliver her own statement, i.e., the members of Congress who were present let her say whatever she wanted about Dotson and made no effort to cut her off even though they must have known, being longtime Washington residents, that Dotson left the NLRB before President Bush was elected, let alone President Clinton. And, just as the council meeting in *Vultaggio* was broadcast on television, so was the "Town Hall" meeting, thus affording little relief to Dotson and Beverly through the presentation of rebuttal at a later time.

The Wisconsin Supreme Court used a particularly vivid illustration to support its conclusion that affording an absolute privilege to legislative witnesses under such circumstances does not properly balance the interests of the speaker with the interests of the defamed:

> The following example will help clarify why we are not persuaded: If the Whitewater city council had met that evening to discuss different ways to improve and beautify the city, a city resident would be completely without redress if a witness falsely and maliciously accused the resident of owning and operating a child pornography business, or of selling drugs from his or her home.

Id. at 338.

That example is no different from Trump's falsely accusing a former Chairman of the NLRB of committing criminal violations of federal ethics laws in seeking employment. Article I, Section 1 of the Pennsylvania Constitution specifically protects individuals' reputational interests, and places those interests in the same category as life, liberty and property. *Sprague v. Walter*, 518 Pa. 425, 438-439, 543 A.2d 1078, 1084 (1984). Thus, Pennsylvania puts greater weight on protecting reputation than many other states. Yet, in discussing the "Town Hall" meeting statements, the District Court failed to even mention Dotson and Beverly's reputational interests. Indeed, there is no doubt that the District Court's analysis in this case would have afforded the speaker from the Wisconsin Supreme Court's illustration the protections of an absolute testimonial privilege. If this Court were to affirm the District Court's holding, the Third Circuit will have chosen to stretch the absolute privilege afforded under Section 590A of the Restatement 2d of Torts beyond its legitimate outermost boundaries and certainly far beyond anything permitted by the Constitution of the Commonwealth of Pennsylvania. This is not what a Pennsylvania state court would have done. Dotson and Beverly submit that doing so under the

circumstances of this case does not adequately protect the interests of the defamed parties, an interest *constitutionally* protected in Pennsylvania — and the holding reached by the District Court is not necessary to promote honest and candid testimony in genuine legislative proceedings.

Further evidence that Pennsylvania courts would go farther than other states to protect the reputations of Dotson and Beverly is contained in *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1984) *rev'd* 475 U.S. 767 (1986). The Pennsylvania Supreme Court held in that defamation case that alleged defamatory material is *presumed* false and that the defendant has the burden of proving the statements are true rather than the plaintiff proving them false. Although the U.S. Supreme Court reversed this decision, placing the burden of proving that the alleged defamatory statements are false on the plaintiff, the Pennsylvania decision illustrates the importance of reputation in the Commonwealth of Pennsylvania and how far its courts will go to protect reputation. In this context, the District Court's disregard for Dotson and Beverly's reputation clearly shows that the Court did not take into consideration Pennsylvania's long-standing, constitutional interest in protecting the reputation of those within its jurisdiction. *See, Sprague, supra* at 438-439.

C. THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE THE CONVERSION OF A MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT WHENEVER MATTERS OUTSIDE THE PLEADINGS ARE PRESENTED AND NOT EXCLUDED BY THE COURT

1. The Court Should Have Applied Fed. R. Civ. P. 56, Notified The Parties And Allowed Dotson And Beverly To Conduct The Discovery Necessary To Respond To A Rule 56 Motion

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of a plaintiff's complaint, and is to be granted only when it appears beyond doubt that the plaintiff can prove no set of facts supporting his claim for relief. *Conley v. Gibson, supra; Penn-Virginia Development Corp. v. Diversified Mortgage Investors*, 395 F. Supp. 195 (W.D. Pa. 1975). Normally, in deciding a motion to dismiss brought under Rule 12(b)(6), the courts will consider only the allegations of the complaint, the exhibits attached to the complaint and matters of public record. *See, Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 998 F.2d 1192, 1196 (3rd Cir. 1993). If other matters are considered, the Civil Rules require that the motion to dismiss

be converted to one for summary judgment, and that the parties be allowed to engage in discovery as provided in Civil Rule 56:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

Fed. R. Civ. P. 12(b) (emphasis added).

The provision of Rule 12(b) requiring a Rule 12(b)(6) motion to be converted into a Rule 56 motion upon the presentation of extrinsic materials is now mandatory. *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2nd Cir. 1991). As explained by the Third Circuit in *Pension Benefit Guaranty, supra*, "the reason that a court must convert a motion to dismiss to a summary judgment motion if it considers extraneous evidence submitted by the defense is to afford the plaintiff an opportunity to respond." *Id.* at 1196, citing *Cortec Industries, Inc. v. Sum Holding, L.P., supra. See, also, Festa v. Local 3 Int'l. Bhd. of Elec. Workers*, 905 F.2d 35, 38 (2nd Cir. 1990).

Appellee Trump submitted numerous matters outside the pleadings to support the affirmative defenses in her Motion to Dismiss that the "Town Hall" meeting held in Pittsburgh on May 19, 1997 was a legislative proceeding and that, therefore, all participants were entitled to absolute immunity for any and all statements made at the meeting.[10] Even Trump recognized, however, that Rule 12(b) required that her Motion to Dismiss be converted to a Rule 56 motion before such materials could be considered by the Court. "[Trump] has presented matters outside the pleadings in relation to points (1) and (4) and therefore, under Fed. R. Civ. P. 12(b), these arguments should be considered as if they supported a motion for

[10]Included among the materials submitted by Trump were the affidavit of a legislative assistant to one of the Congressmen in attendance at the "Town Hall" meeting, a copy of a bill introduced into Congress a few days prior to the "Town Hall" meeting (which bill Trump claims to have been the focus of the meeting) and a videotape of the "Town Hall" meeting apparently recorded and broadcast by a local cable television station. (J.A., pp. 30-35).

summary judgment and partial summary judgment respectively." (Memorandum in Support of Motion to Dismiss, J.A., p. 71, fn. 1). In fact, Trump specifically requested the District Court to convert her Motion to Dismiss into a motion for summary judgment, as required by the Civil Rules:

> Moreover, [Trump] requests that this Court give [Appellants] formal notice of its intent to treat the two arguments as if they were contained in a motion for summary judgment under Rule 56 and allow them an opportunity to submit additional evidence in opposition. *See Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989).

(Memorandum in Opposition to Motion to Exclude Extrinsic Materials, J.A., p. 285).

Dotson and Beverly opposed the Court's consideration of any materials outside the pleadings and promptly filed a Motion to Exclude. Alternatively, Dotson and Beverly agreed with Trump that if the Court considered such materials, Trump's Motion must be converted to one for summary judgment, and argued that Dotson and Beverly should be given notice and an opportunity to discover evidence to rebut the extrinsic materials submitted by Trump. (Reply Memorandum in Support of Plaintiffs' Motion to Exclude Extrinsic Materials, J.A., pp. 300-304).

Yet, in spite of the parties' mutual recognition that the Federal Rules of Civil Procedure required it to convert Trump's Motion to Dismiss into one for summary judgment, the District Court refused to do so, not only ignoring the Motion to Exclude Extrinsic Materials submitted by Dotson and Beverly, but depriving Dotson and Beverly of their rights as guaranteed by the Federal Rules of Civil Procedure.

This Court reversed Judge Lancaster just last year on similar grounds in *Independent Enterprises v. Pittsburgh Water*, 103 F.3d 1165 (3rd Cir. 1997). In that case, Judge Lancaster: 1) considered matters provided by the defendant which were outside the pleadings; 2) failed to give notice to the plaintiff that the motion to dismiss would be converted to a motion for summary judgment; and 3) failed to give plaintiff the opportunity to submit relevant material. This Court stated:

> Because [plaintiff] indeed was not given an opportunity to submit evidence to defeat a motion for summary judgment, we will treat the district court's decision as a 12(b)(6) dismissal and will disregard anything other than the allegations of the

> complaint when conducting our plenary review of that decision.

Id. at 1168, fn.2

Dotson and Beverly ask this Court to review Judge Lancaster's decision here in the same manner as it did his decision in *Independent Enterprises* and remand this case for further proceedings.

> 2. The Extrinsic Materials Submitted By Trump And Accepted By The District Court Are Not Irrefutably Authentic And Should Not Have Been Considered Without Opposing Evidence

In granting Trump's Motion to Dismiss, the District Court considered a copy of H.R. 1624 and a videotape of the "Town Hall" meeting where Trump's allegedly false and defamatory statements were made. (Memorandum Opinion, p. 2). Both items were attached as exhibits, not to the Complaint, but to Trump's Motion to Dismiss. Yet, the Court did not convert Trump's Rule 12(b)(6) Motion to a motion for summary judgment, or give Dotson and Beverly the opportunity to respond to the extrinsic materials through discovery. Instead, the District Court believed that it was proper to consider these materials because they were "irrefutably authentic":

> A court may also consider any irrefutably authentic documents that a defendant attaches as an exhibit to the motion to dismiss if the plaintiff's claim is based in whole or in part on the documents. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

Memorandum Opinion, p. 2.

The District Court's reliance upon this language from the *Pension Benefit Guaranty* case is misplaced. In that case, the plaintiff's claim was based upon a purchase and sale agreement which was described in, but not attached as an exhibit to, the complaint. Instead, the defendant attached the agreement as an exhibit to the defendant's motion to dismiss. There was no dispute that the agreement submitted by the defendant was authentic and dispositive of the issues raised by the plaintiff's complaint.

The District Court also misinterprets the purpose behind the *Pension Benefit Guaranty* rule. The rule is designed to prevent a plaintiff from extracting a statement from a document and placing it in the complaint while, had the entire document been attached, it would have

been clear that the statement in the complaint was inapplicable to the matter. *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1426 (3rd Cir. 1997). Here, however, Dotson and Beverly took nothing out of context with respect to their defamation claims in Count II. Also, as this Court stated in *In re Burlington*, the rule is to allow the Court to consider materials upon which plaintiff based its claims. *Id.* at 1426. The Court never considered the merits of Dotson and Beverly's defamation claims. It only considered Trump's affirmative defense of legislative immunity. But, Dotson and Beverly *did not base their claims relating to legislative immunity on the meeting itself* but upon events prior to the meeting, initiated and orchestrated by the SEIU to attack Beverly. Under these circumstances, the District Court could not, nor should it have tried to, decide whether the meeting was a legislative proceeding by simply reviewing the tape supplied by Trump. The District Court stretched the purpose of the *Pension Benefit Guaranty* rule far beyond what this Court has held is proper.

There is no one document which irrefutably governs this dispute. The District Court found the issue of legislative immunity to be dispositive, but even the videotape of the "Town Hall" meeting submitted as an exhibit to Trump's Motion to Dismiss is not dispositive of whether the meeting was a "legislative proceeding." While an irrefutably authentic contract can be dispositive of a breach of contract action, the "Town Hall" videotape is, at most, some evidence of what was said, who was present and how the "Town Hall" meeting was conducted.[11] Nothing in the tape could possibly contravene what Dotson and Beverly said in their Complaint about how the meeting was orchestrated by the SEIU long before any legislation was introduced. Hence, the legislative immunity issue cannot be resolved without an inquiry into the purpose of the meeting, the motivation and intent of the participants, and the extent of the SEIU and Trump's involvement in planning and organizing the meeting.

D. TRUMP'S STATEMENTS AT A POLITICAL RALLY ACCUSING DOTSON OF ANTI-SEMITISM AND CRIMINAL CONDUCT ARE DEFAMATORY UNDER PENNSYLVANIA LAW

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[11]In addition, the District Court had no evidence before it properly authenticating the videotape of the "Town Hall" meeting. The videotape was merely submitted as an attachment to an affidavit of Appellee Trump wherein she states that the videotape was a copy of a video purchased by the SEIU from a cable television station.

1. Pennsylvania Courts Have Never Held That Fact-Based Accusations Of Anti-Semitism, Racism Or Criminal Conduct Are Incapable Of A Defamatory Meaning As A Matter Of Law

In a confrontation at a political rally for presidential candidate Bob Dole on August 18, 1996, Appellee Trump accused Appellant Donald Dotson of being a "criminal" and shouted at him, "You people at Beverly are all criminals." Trump further accused Dotson of "devoting [his] entire career to busting unions," and then shouted at Dotson, "I know your kind. You're just part of that World War II generation that danced on the graves of Jews."

The District Court labeled Trump's statements about Dotson at the Dole Kemp rally as "mere obscenities, insults or other verbal abuse" or "mere hyperbole and insulting rhetoric" (Memorandum Opinion, pp. 4, 5), which the Court found to be incapable of defamatory meaning because no person would have taken such statements literally. In the process, the District Court concluded that an individual has no redress in the Commonwealth of Pennsylvania when he is falsely and maliciously accused of anti-Semitism. In reaching these conclusions, however, the District Court misconstrued Supreme Court doctrine and Pennsylvania precedent, and extended First Amendment protections well beyond the bounds of previous legal precedent.

The United States Supreme Court has long afforded First Amendment protection for "imaginative expression" and "rhetorical hyperbole." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). This protection, however, only applies to statements "that cannot reasonably be interpreted as stating actual facts about an individual." *Id.* at 17, 20, citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

Inexplicably missing from the District Court's Opinion is a citation to the leading case regarding the protection afforded rhetorical hyperbole, *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970). In that case, a prominent real estate developer sued a newspaper regarding its reports of various public meetings where the developer had attempted to secure zoning variances while, at the same time, the city considering those variances was trying to buy land from the developer. The articles accurately reported that some citizens who opposed the developer's efforts had characterized his position as "blackmail." The developer sued, claiming that the articles imputed to him the crime of blackmail. The Supreme

Court, however, found it constitutionally impermissible to impose liability for use of the word "blackmail" in this context:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: It was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

Id. at 14-15 (footnote omitted).

It cannot be credibly asserted that Trump's accusation that Dotson is a union-busting criminal is the same as the defendant's use of the word "blackmail" in the *Greenbelt Publishing* case. In *Greenbelt Publishing*, the lawsuit was based upon newspaper reports which fully explained the circumstances surrounding the use of the term "blackmail." Trump's accusations of criminal conduct by Beverly and Dotson were made with no context, and without any explanation being given to the accusations. As a result, other attendees at the Dole/Kemp rally could reasonably have interpreted Appellee Trump's statements as alleging actual facts about Dotson.

The one Supreme Court decision which the District Court did rely upon likewise fails to support its conclusion. In *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin*, 418 U.S. 264 (1974), a union was sued for including the plaintiffs on a list of "scabs" printed in a union newsletter, along with the publication of "a well-known piece of union literature, generally attributed to author Jack London" that defined "scabs" as having "rotten principles," lacking in character and being traitors. *Id.* at 268. Unlike the instant case, however, the Court in *Austin* found that the union's newsletter was published pursuant to its protected organizing activities and that, as in *Greenbelt Publishing*, "it is . . . impossible to believe that any reader . . . would have understood the newsletter to be charging [the plaintiffs] with committing the criminal offense of treason." *Id.* at 285-86.

By contrast, Appellee Trump's mean-spirited accusations did not invoke familiar rhetoric from historic trade union literature, but instead made specific accusations of illegal and immoral conduct. The U.S. Supreme Court would not, in this instance, find that it was "simply impossible" for a listener to believe that Trump's statements to Dotson were fact-based accusations. In fact, there are available substantial public records chronicling Dotson's long career in labor relations, as Assistant Secretary of the U.S. Department of Labor for Labor-Management Relations and as Chairman of the National Labor Relations Board, with which Trump's union-busting allegations could be objectively verified. On the other hand, there was no objective verification possible of the statements made in the *Greenbelt Publishing* and *Nat'l Assn. of Letter Carriers* cases. In fact, any comparison to the facts in either of those cases can only lead to the conclusion that Trump's statements at the Dole/Kemp rally are actionable.

Nor is the District Court's conclusion supported by the one Pennsylvania case upon which it relied. In *Kryeski v. Schott Glass Tech.*, 426 Pa. Super. 105, 626 A.2d 595 (1993), an employee who claimed to be a victim of sexual harassment and discrimination at her workplace alleged that a co-worker had defamed her by calling her "crazy." Unlike the present case, it was clear that the allegedly defamatory statement in *Kryeski* was mere name-calling, made in a casual and informal conversation which was not meant literally. *Kryeski, supra*, at 117. Likewise misplaced is the Court's reliance on a Virginia case, which held that claims of defamation based upon calling someone a "cocksucker" and "mother-fucker" were not actionable. (*See*, Memorandum Opinion, p. 4). This is not a case about simple name-calling, and there can be no comparison between the words used in the Virginia case and the words used by Trump in this case.

Perhaps most troublesome is the District Court's general conclusion that Pennsylvania courts do not provide redress for plaintiffs who have been accused of anti-Semitism, or other forms of bigotry and racism. In a brief footnote, devoid of legal analysis or citation to precedent, the District Court concludes that "the Pennsylvania courts have been consistent in holding that an allegation of bigotry is, without more, not actionable in defamation." (Memorandum Opinion, p. 5, n. 1). This is incorrect. If the District Court had carefully analyzed Pennsylvania case law on this issue, it would have found that Pennsylvania courts have *not* "consistently" held that allegations of bigotry and racism are never actionable.

Although dismissed summarily as "obvious dicta" in the District Court's footnote,[12] the Pennsylvania Supreme Court's most recent pronouncement on this issue, *MacElree v. Philadelphia Newspapers*, 544 Pa. 117, 674 A.2d 1050 (1996), more accurately reflects current social values in Pennsylvania and clearly demonstrates that liability for defamation based on an accusation of anti-Semitism cannot be avoided merely by labeling such accusation as angry name-calling.

In MacElree v. Philadelphia Newspapers, supra, a district attorney alleged that a newspaper letter-to-the-editor, which accused him of "electioneering" and which called him "the David Duke of Chester County," was libelous because it labeled him as a racist who abused his power as a district attorney to further his racist views. The case was dismissed by the trial court upon defendant's preliminary objections, which characterized the communication as merely labeling plaintiff as a racist. The Pennsylvania Supreme Court reversed, pointing out that "[a]lthough allegations of racism have been held not to be actionable defamation, it cannot be said that every such accusation is not capable of a defamatory meaning as a matter of law." *Id.* at 127. Only "where there is no possibility that harm can be established, and the communication is therefore not defamatory, [may] the trial judge . . . properly order that the case be dismissed." *Id.* Since allegations of racism against a district attorney could possibly lower the district attorney's reputation in the estimation of the community, or deter third persons from associating or dealing with him, the *MacElree* Court found it improper to dismiss the allegations of libel as a matter of law.

The *MacElree* Court stated that a charge of racism clearly could tend to harm the reputation of the accused so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Id.* at 127, citing *Thomas Merton Center v. Rockwell International Corp.*, 497 Pa. 460, 464, 442 A.2d 213, 215 (1981), cert.

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[12] Appellants are unable to explain the District Court's reference to "obvious dicta." Pennsylvania courts use Black's Law Dictionary to define "dicta" as: "Expressions in court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases." *Pennsylvania v. Bradshaw*, 290 Pa. Super. 162, 166, fn. 4, 434 A.2d 181, 182, fn. 4 (1981), citing Black's Law Dictionary, 408 (5th ed. 1979). What the District Court erroneously referred to as "obvious dicta" in *MacElree* was an expression of the law of the Commonwealth that was used to reverse the lower court's decision in that case.

denied, 457 U.S. 1134 (1982). The Court went on to state "[w]here such a possibility exists, it is up to the jury as fact finder to determine its existence." *MacElree*, *supra* at 127. Clearly, Pennsylvania recognizes that charges of racism are *capable* of being considered defamatory. The District Court's responsibility in this matter was to review the defamatory comments alleged in the Complaint, and it should have denied Trump's Motion to Dismiss because the comments as alleged are capable of being considered defamatory.

Just like the former district attorney in *MacElree*, Dotson must be given the opportunity to establish harm to his reputation as a result of Trump's accusations of anti-Semitism. As a corporate executive in charge of labor and employment matters for the largest private owner of nursing homes in the country, where his responsibilities include the application and administration of federal equal opportunity and anti-discrimination laws, it cannot be said that, as a matter of law, Trump's statements would not lower Dotson in the estimation of the community or deter third persons from associating or dealing with him. In addition, Dotson spent many years in public service as Assistant Secretary of the U.S. Department of Labor for Labor-Management Relations and Chairman of the National Labor Relations Board, positions of great responsibility and national import in the field of labor management relations. Certainly, a person who has held such high public office, and who was ultimately charged with responsibility for implementing the country's labor laws in a fair and non-discriminatory manner, would be gravely harmed by unfounded accusations of anti-Semitism. Finally, Appellant Beverly is a large, nationwide organization which seeks to — and does — provide nursing and rehabilitative care to its residents without regard to ethnic, religious or racial considerations. The mere suggestion that one of its highest ranking executives could harbor or practice the type of prejudice alleged by Trump could have a devastating impact on both Dotson and Beverly. The Pennsylvania Supreme Court's most recent pronouncement on this issue indicates that more than a superficial analysis of the accusation must occur before the claim can be dismissed. It certainly cannot be done in the cursory manner afforded by the District Court in this case.

In fact, the Pennsylvania Court's holding in *MacElree v. Philadelphia Newspapers*, *supra*, casts doubt on the continued viability of its decision in *Rybas v. Wapner*, 311 Pa. Super. 50, 457 A.2d 108 (1983) (the only Pennsylvania case cited by Trump in support of her argument in the District Court that charges of anti-Semitism are not actionable as a matter of law). In *Rybas*, the Court found that a charge of anti-Semitism made in a

letter sent from one lawyer to another was not actionable. A key factor in the Court's decision, however, was the limited nature of the intended audience, i.e., one lawyer. "We need not speculate whether Wapner's alleged libel would be capable of a defamatory meaning if it appeared in some other context." *Id.* at 57, distinguishing *O'Donnell v. Philadelphia Record Co.*, 356 Pa. 307, 51 A.2d 775 (1947), cert. denied, 332 U.S. 766 (1947), finding that accusing a columnist of being a "Naziphile" in a newspaper article was in fact libelous.[13]

In short, Appellee Trump should not be allowed to escape liability for her accusation of anti-Semitism by superficially labeling it as a vigorous epithet. As with her accusations of union-busting and criminal conduct, a reasonable listener could have concluded that Trump was making fact-based accusations, which are objectively verifiable and which can appropriately form the basis of a defamation action. If allowed to stand, the District Court's Opinion clearly sends out the wrong message regarding the acceptability in Pennsylvania of accusations of criminal conduct, anti-Semitism, bigotry and other forms of racism.

2. Appellee Trump's Statements About Dotson At The Dole/Kemp Rally Did Not Arise In The Context Of A Labor Dispute

In addition to its finding that Trump's statements were either rhetorical hyperbole or vigorous epithets which were not meant literally and would not be taken seriously by those who heard them, the Court made

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[13] *Yaeger v. Local Union 20*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983), cited by the District Court, does not support the decision below for two reasons. *First*, there was no doubt that the allegedly defamatory statements in that case arose in the context of a labor dispute, as the words at issue appeared on picket signs and handbills. *Second*, Ohio follows the doctrine of innocent construction, which was applied by the Court in *Yaeger*, and which requires any defamation complaint in Ohio to be dismissed if it is based upon a communication which is susceptible to both a defamatory and non-defamatory interpretation. Pennsylvania, to the contrary, requires defamation complaints to go forward if they are based upon communications which are susceptible to both defamatory and non-defamatory interpretations. *See, Gordon v. Lancaster Osteopathic Hospital Assn.*, 340 Pa. Super. 253, 261, 489 A.2d 1364, 1368 (1985), citing *Zelik v. Daily News Publishing Co.*, 288 Pa. Super. 277, 431 A.2d 1046 (1981); and, *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. 588, 422 A.2d 625 (1980).

a finding that Trump's accusations were made in the context of a labor dispute.

Trump's statements, however, were not made at a labor function and made no reference to any labor dispute then existing between Trump's employer and Dotson's employer. Instead, Trump's statements were personal attacks on Dotson maliciously made with the intent to harm his personal reputation. None of the constitutional defenses relied upon by the District Court, whether considered individually or in combination with each other, justify the early dismissal of Dotson's claims arising out of the malicious lies uttered by Trump at the Dole/Kemp political rally without at least affording Dotson the opportunity to discover facts relating to the knowledge, understanding and reaction of the recipients of those statements.

Drawing all reasonable inferences from the Complaint in Dotson's favor, it cannot be said, as a matter of law, that Trump's statements to Dotson at the Dole/Kemp rally arose "in the context of the labor dispute." The scene was a presidential campaign rally, not a picket line. The angry words which are the subject of Count I were directed at Mr. Dotson personally, and did not concern any outstanding issues between Appellant Beverly and the SEIU. Instead, Count I of the Complaint is based upon direct personal and verbal attacks, and not statements or slogans appearing on union campaign literature. Most importantly, Trump's words had nothing to do with any conditions of employment or other labor/management issues.

Raffensberger v. Moran, 336 Pa. Super. 97, 495 A.2d 447 (1984), relied upon by the District Court, does not support the Court's finding that the statements at issue arose in the context of a labor dispute. In that case, an employee truck driver sued a member of management based on an accusation that the employee was a "break down artist," a term commonly understood within the trucking business to describe drivers who intentionally break down on the road to collect additional wages. The Court attempted to define a standard by which to determine whether or not a defamatory publication arises in the course of a labor dispute. Turning to *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin, supra*, for guidance, the court in*Raffensberger* noted that the National Labor Relations Act ("NLRA") reflected "a Congressional intent to encourage free debate on issues dividing labor and management." *Raffensberger v. Moran, supra* at 106, 485 A.2d 452, quoting *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin, supra* at 272.

Thus, the Court in *Raffensberger* concluded that the statement at issue did in fact arise in the context of a labor dispute because it addressed a "condition of employment":

> It must be concluded, therefore, that the [defamatory publication] arose from and was related to a controversy or dispute between management and certain employees. That controversy, it seems clear, pertained to "conditions of employment."

Id. at 107, 485 A.2d 452. It should be noted that, even though the *Raffensberger* Court found that the "break down artist" accusation arose in the context of a labor dispute, the Court concluded that the accusation was capable of a defamatory meaning and sent the plaintiff's claims to a jury on the question of actual malice. The District Court should have done the same here for the reasons discussed in Section D.3., *infra*.

The *Raffensberger* Court's analysis of the meaning of "arising in the context of a labor dispute" is consistent with the definition provided by Congress in the Labor Management Relations Act of 1947:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 152(9).

Trump's accusations at the Dole/Kemp political rally did not in any way relate to a condition of employment or an issue in dispute between labor and management. Merely because the parties may have been engaged in collective bargaining negotiations at the time does not give Trump license to publicly accuse Dotson of criminal conduct or anti-Semitism. This is not the kind of "free debate on issues dividing labor and management" which Congress intended to encourage through the National Labor Relations Act. The District Court's conclusion that a reasonable listener to Trump's tirade against Dotson would understand that it stemmed from an ongoing labor dispute is supported by neither fact nor logic. The more reasonable inference, which the District Court was required to draw in considering Trump's Motion to Dismiss, is that most people who observed and heard Trump's statements at the Dole/Kemp rally would have

no reason to know they had anything to do with an ongoing labor dispute between Beverly and the SEIU.

3. The National Labor Relations Act Does Not Protect The Malicious Lie

According to the District Court, angry and defamatory words uttered by union members about management are excused if the parties are engaged in collective bargaining negotiations at the time the statements are made. This interpretation, however, would broaden the protection for defamatory statements issued in the context of a labor dispute far beyond existing precedent.

The seminal case on defamation in a labor dispute context, *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), makes clear that the "known lie" — an intentional or reckless falsehood — finds no safe harbor in the First Amendment. As the Court stated in *Linn:*

> [I]t must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.

Id. at 67. Moreover, Pennsylvania courts may go no further than the United States Supreme Court dictates in protecting First Amendment principles, lest they violate Pennsylvania's Constitution which explicitly places an extremely high value on reputation:

> It is clear that the Supreme Court has set forth the parameters necessary to satisfy the dictates of the First Amendment. Any further action on our part could run afoul of our state constitution. Under Article I, Section 1 of the constitution of this commonwealth, a person's interest in his or her reputation has been placed in the same category with life, liberty and property.

Sprague v. Walter, 518 Pa. 425, 438-439, 543 A.2d 1078, 1084 (1988).

In Linn v. United Plant Guard Workers, supra, the U.S. Supreme Court recognized a strong interest in preventing and redressing attacks upon reputation, and held that an employer can properly recover damages in a tort action arising out of a labor dispute if the employer can prove "malicious intent" as defined by the Supreme Court in *New York Times*

Co. v. Sullivan, 376 U.S. 254 (1964). *See, also, Raffensberger v. Moran, supra;* and, *Community Medical Services of Clearfield, Inc. v. Local 265 AFSCME*, 292 Pa. Super. 238, 242, 437 A.2d 23, 25 (1981). Not allowing an employer to recover for the malicious lie would "totally deprive" a plaintiff of a remedy for an actual injury. *Linn v. United Plant Guard Workers, supra*, at 63. Furthermore, declaring any suit seeking damages under state law tort theories to be preempted by the National Labor Relations Act would "ignore the substantial state interest in protecting the health and well-being of its citizens," including its corporate citizens. *Farmer v. Carpenters*, 430 U.S. 290 (1977). Specifically, with regard to state law defamation claims, the Court in *Linn* explicitly stated that the NLRA does not preempt state law defamation claims:

> Whether either party to a labor dispute circulates false and defama tory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves the statements were made with malice and injured him.

Linn v. United Plant Guard Workers, supra, at 55.

Count I of the Complaint alleges that Trump's statements to Dotson at the Dole/Kemp political rally were made by Trump with knowledge of their falsity or in reckless disregard of their truth or falsity, the standard set forth in *New York Times Co. v. Sullivan, supra*, and adopted in *Linn v. United Plant Guard Workers* for allegations of defamation arising in a labor dispute. Further, Count I of the Complaint alleges that Trump's accusations have caused actual injury to Dotson's reputation. Thus, even if the District Court's finding that Trump's statements at the Dole/Kemp rally did, in fact, arise in the context of a labor dispute were plausible, the statements are actionable because the Complaint properly alleges that the statements were made with actual malice. As the relevant precedent clearly demonstrates, the country's labor laws do not protect the malicious lie.

IX. CONCLUSION

For these reasons, Appellants Beverly Enterprises, Inc. and Donald Dotson respectfully request this Court to reverse the District Court's Memorandum Opinion and Order granting Appellee Rosemary Trump's Motion to Dismiss, and remand this case to the District Court so that it may proceed with full discovery and a trial on the merits of the Dotson and Beverly claims.

Respectfully submitted

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